No. 15-105

In the Supreme Court of the United States

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER COLORADO, ET AL.

v.

SYLVIA MATHEWS BURWELL, SECRETARY OF HEALTH & HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The text of the Affordable Care Act (ACA) says nothing about contraceptive coverage, but it does require employers to "provide coverage" for "preventive care" for women. The Department of Health and Human Services (HHS) has interpreted that statutory mandate to require employers through their healthcare plans to provide at no cost the full range of FDA-approved contraceptives, including some that cause abortions. Despite the obvious implications for many employers of deep religious conviction, HHS decided to exempt only some nonprofit religious employers from compliance. As to all other religious employers, HHS demanded compliance, either directly or via a regulatory mechanism through which they must execute documents that authorize and obligate third parties to use their healthcare plans to facilitate the provision of contraceptive coverage to their employees and that, in the government's view, put these religious employers and their plans in compliance with the statutory "provide coverage" obligation.

This Court has already considered the direct method of compliance and concluded that it imposes a substantial burden on religious exercise and violates the Religious Freedom Restoration Act (RFRA). It is undisputed, however, that nonexempt religious employers such as petitioners hold equally sincere religious objections to the regulatory method of compliance as well. It is further undisputed that they face draconian fines if they refuse to comply via one of those two avenues.

The questions presented are:

1. Does the availability of a regulatory method for nonprofit religious employers to comply with HHS's contraceptive mandate eliminate either the substantial burden on religious exercise or the violation of RFRA that this Court recognized in *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014)?

2. Can HHS satisfy RFRA's demanding test for overriding sincerely held religious objections in circumstances where HHS itself insists that overriding the religious objection will not fulfill HHS's regulatory objective—namely, the provision of no-cost contraceptives to the objector's employees?

3. Does the First Amendment allow HHS to discriminate among nonprofit religious employers who share the same sincere religious objections to the contraceptive mandate by exempting some religious employers while insisting that others comply?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 DISCLOSURE

Petitioners, who were Plaintiffs below, are the Little Sisters of the Poor Home for the Aged, Denver, Colorado, a Colorado nonprofit corporation; Little Sisters of the Poor, Baltimore, Inc., a Maryland nonprofit nonstock corporation, by themselves and on behalf of all others similarly situated; Christian Brothers Services, a New Mexico nonprofit corporation; Christian Brothers Employee Benefit Trust; Reaching Souls International, Inc., an Oklahoma not-for-profit corporation; Truett-McConnell College, Inc., a Georgia nonprofit corporation, by themselves and on behalf of all others similarly situated; and GuideStone Financial Resources of the Southern Baptist Convention, a Texas nonprofit corporation. GuideStone's sole member is the Southern Baptist Convention, a Georgia religious-nonprofit corporation. No other petitioner has a parent corporation. No publicly held corporation owns any portion of any of the petitioners.

Respondents, who were Defendants below, are Sylvia Burwell in her official capacity as Secretary of the United States Department of Health and Human Services; the United States Department of Health and Human Services; Thomas E. Perez in his official capacity as Secretary of the United States Department of Labor; the United States Department of Labor; Jacob J. Lew, in his official capacity as Secretary

of the United States Department of the Treasury; and the United States Department of the Treasury.

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PETITION FOR A WRIT OF CERTIORARI

The Little Sisters of the Poor are Catholic nuns who devote their lives to caring for the elderly poor. The government has put them to the impossible choice of either violating the law or violating the faith upon which their lives and ministry are based. HHS insists that the Little Sisters must comply with a mandate that their employee healthcare plans "provide coverage" for free contraceptives. Although there is no dispute that the Little Sisters sincerely believe that all the available compliance methods would make them morally complicit in grave sin, HHS refuses to give them the exemption it has given other religious employers, and instead requires them to comply, either directly or by executing documents that authorize and obligate others to use the Little Sisters' healthcare plans to accomplish the "seamless" provision of contraceptive coverage.

HHS does not dispute that the Little Sisters sincerely believe that their religion no more allows them to comply with the mandate via this regulatory mechanism than to do so directly. But HHS disagrees with the Little Sisters' moral analysis. In its view, the Little Sisters are "fighting an invisible dragon" that can be vanquished with the "stroke of their own pen." If the Little Sisters follow their own moral compass instead of HHS's, they face millions of dollars in penalties.

This Court addressed a nearly identical dynamic in upholding the religious exercise claim of three family-owned for-profit companies in *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014). The Court made clear beyond cavil—as it had in a long

line of cases preceding *Hobby Lobby*—that courts may not second-guess sincerely-held religious beliefs by suggesting that the degree of complicity required is insufficient to violate religious scruples. Thus, especially after *Hobby Lobby*, there should be no doubt that the religious exercise of the Little Sisters and their co-petitioners has been substantially burdened. The mandate and the penalties for noncompliance here are identical, and petitioners sincerely believe that the only avenues for complying with the mandate violate their religion. That should be the end of the substantial burden inquiry.

Remarkably, the Tenth Circuit nonetheless concluded that there is no substantial burden on religious exercise because, in its view, the regulatory avenue does not really make petitioners morally complicit. That approach plainly conflicts with *Hobby Lobby* and decades of cases before it forbidding courts from engaging in any such inquiry. It also plainly conflicts with RFRA itself, which protects "any religious exercise," not just those exercises that a court finds reasonable or consistent with its own views of an adherent's religion. Without this Court's intervention, the Little Sisters will be forced to choose between violating their religion or violating the ACA, as a consequence of a decision that is flatly irreconcilable with this Court's precedents.

That would be reason enough for plenary review, but a number of additional considerations strongly support this Court's review at this juncture and in this case. This Court has already used its extraordinary authority under the All Writs Act in three cases involving challenges to the mandate by nonprofit re-

ligious employers, including this one. The felt need for that extraordinary intervention both underscores the extraordinary importance of this issue and makes clear that deferring review will produce not orderly percolation, but the need for further extraordinary intervention by this Court.

Furthermore, this case vividly illustrates just how extreme HHS's position really is, as HHS has demanded that the Little Sisters comply with the mandate via the regulatory option to which they object even though HHS itself insists that doing so will not fulfill its regulatory objective of providing free contraceptives to the Little Sisters' employees. That makes the need for review particularly important here. Whatever the strength of the government's interest in overriding sincere religious objections when doing so will allow it to accomplish its regulatory objectives, it cannot possibly have a compelling interest in overriding sincere religious objections when the government claims doing so will not even produce that result. Accordingly, for the Little Sisters and the over-400 employers in their class action, HHS's least restrictive means case is distinctly weak. Thus, the Little Sisters should prevail no matter how the Court ultimately resolves that analysis for other religious objectors as to which HHS's insistence on regulatory compliance is more likely to fulfill its regulatory objective. Because this petition includes both the Little Sisters (and its class) as well as employers like Reaching Souls, it allows the Court to consider both least restrictive means contexts together. But even if the Court grants another petition, it should grant the instant petition to ensure that HHS's insistence on overriding sincere religious objections even when it

says it cannot accomplish its regulatory goals does not escape this Court's review.

After the decision below, the right of the Little Sisters to practice their religion as they understand it hangs in the balance. And their religious objections are hardly idiosyncratic. Indeed, objections to HHS's regulatory compliance method are so pervasive and profound that it is inevitable that this Court will need to resolve the exceptionally important questions presented. The Court should do so in time to ensure that religious exercise rights of the Little Sisters and their fellow petitioners are not sacrificed to a fundamentally misguided decision about what constitutes a substantial burden and the proper role for an Article III court in evaluating sincere religious beliefs.

OPINIONS BELOW

The district court's opinion in *Little Sisters* is reported at 6 F.Supp.3d 1225. App.152a. The district court's opinion in *Reaching Souls*, 2013 WL 6804259, is unreported. App.190a. The Tenth Circuit's opinion is reported at --- F.3d ---, 2015 WL 4232096. App.2a.

JURISDICTION

The Tenth Circuit's judgment was entered on July 14, 2015. App.2a. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The provisions are set forth in Appendix E (App.211a).

STATEMENT

The Contraceptive Mandate

The ACA mandates that any "group health plan" must "provide coverage" for "preventive care" for women without "any cost sharing." 42 U.S.C. 300gg-13(a). Congress itself did not define "preventive care" but instead allowed HHS to do so. *Ibid.* HHS outsourced that "important and sensitive decision" to the Institute of Medicine, a private organization. *Hobby Lobby*, 134 S.Ct. at 2762. The Institute's definition, which HHS adopted, includes all FDA-approved contraceptive methods and sterilization procedures, including four methods that can prevent the implantation of a fertilized egg. *Id.* at 2762-63. Failure to "provide coverage" for all FDA-approved methods and procedures triggers severe penalties. See, *e.g.*, 26 U.S.C. 4980D ($100 per day per affected individual); 26 U.S.C. 4980H ($2000 per year per full-time employee).

The mandate to cover all FDA-approved contraceptives is not universal; instead, it is subject to both statutory and regulatory exemptions. First, as a statutory matter, employers with "grandfathered" healthcare plans—plans that existed before March 30, 2010, and have not made certain changes after that date—need not comply with the "provide coverage" mandate at all. See 42 U.S.C. 18011; *Hobby Lobby*, 134 S.Ct. at 2764. Although these plans cover tens of millions of individuals and must comply with a subset of ACA reforms that Congress prioritized and "HHS has described as 'particularly significant protections,'" the statutory mandate to cover preventative care, which has been administratively inter-

preted to mandate contraceptive coverage, "is expressly excluded from this subset." *Id.* at 2780 (quoting 75 Fed. Reg. 34,538, 34,540 (June 17, 2010)); see also 42 U.S.C. 18011(a)(4). That exclusion exists "simply [to serve] the interest of employers in avoiding the inconvenience of amending an existing plan." *Hobby Lobby*, 134 S.Ct. at 2764. Although HHS has suggested that it intends to phase grandfathered plans out over time, it has not actually done so; instead, "there is no legal requirement that grandfathered plans ever be phased out." *Id.* at 2764, n.10.

Second, the statute provides that employers with fewer than fifty employees are not required to offer insurance at all. See 26 U.S.C. 4980H(c)(2)(A). These small employers—who collectively employ an estimated 34 million Americans—can avoid the mandate by not offering insurance. *Hobby Lobby*, 134 S.Ct. at 2764.

Third, after an initial outcry, HHS recognized that its mandate implicated sincere religious objections and created a regulatory exemption for certain "religious employers." 78 Fed. Reg. 39,870, 39,874 (July 2, 2013); 45 C.F.R. 147.131(a). This exemption is available to tens of thousands of churches and "integrated auxiliaries," a category defined by how a ministry is funded and how closely it is controlled by a church. 26 C.F.R. 1.6033-2(h). A "religious employer" need not do anything to avail itself of this exemption; it need not certify its religious beliefs, execute or deliver any forms, provide notice to HHS or any other government authority, or do anything that would allow anyone to seize its employee healthcare infor-

mation and plan infrastructure to provide contraceptive coverage.

Nonprofit Religious Organizations and the Mandate

Although HHS was well aware that religious objections to the mandate were by no means limited to houses of worship or their "integrated auxiliaries," it nonetheless refused to exempt other nonprofit religious organizations from the contraceptive mandate. Countless faith-based charities, orders of nuns, religious colleges and seminaries, and other religious organizations remain subject to the mandate. HHS attempted to justify that decision on the theory that houses of worship "are more likely than other employers to employ people of the same faith who share the same objection." 78 Fed. Reg. at 39,874. So instead of exempting these nonprofit employers, HHS created another way for them to "comply" with the mandate. *Id.* at 39,879 ("an eligible organization is considered to comply with section 2713 of the PHS Act"); accord 80 Fed. Reg. 41,318, 41,344 (July 14, 2015). To be clear, this so-called "accommodation" is not an exemption, but a means by which the nonprofit can *fulfill* its statutory obligation to provide coverage.

This regulatory compliance method requires a nonexempt religious employer to "self-certify" that it is a religious employer and has religious objections to providing some or all contraceptive methods. 26 C.F.R. 54.9815-2713AT(b)(ii)(A), (c)(1). That certification does not exempt the employer or its healthcare plan from the mandate. Instead, it "cause[s] the legal responsibility to provide contraceptive coverage to

shift" either to the employer's insurer or, for a self-insured employer (which many religious employers are), its TPA, App.48a, 80a, to make "separate payments for contraceptive services directly for plan participants and beneficiaries." 78 Fed. Reg. at 39,876; see 26 C.F.R. 54.9815-2713AT(b)(2), (c)(2). In other words, unlike the exemption provided to grandfathered plans and other religious employers, the "accommodation" does not excuse the employer from ensuring that participants in its plan receive contraceptive coverage in connection with that plan. It instead provides a regulatory mechanism that still requires the employer to satisfy both the statutory obligation to provide preventative care and the regulatory obligation to provide contraceptive coverage.

Originally, objecting nonprofits had only one method of "self-certifying": executing and delivering to their insurer or TPA the Employment Benefits Security Administration Form 700. App.24a. Execution of this document is critical not only to discharging the employer's statutory/regulatory obligation, but also to the actual provision of the objected-to coverage. As the form states, upon execution and delivery, it becomes "an instrument under which the plan is operated." App.261a. It designates the TPA as "plan administrator and claims administrator," not generally, but "solely for the purpose of providing payments for contraceptive services for participants and beneficiaries." 78 Fed. Reg. at 39,879; 29 C.F.R. 2510.3-16(b), (c).

That designation is essential because without it, a TPA would have no contractual authority to utilize plan information to pay *any* claims (let alone claims

for contraceptives excluded from the employer's plan), or the legal authority to use plan information for that purpose. And self-funded plans generally can be modified only by a written document, as a matter of both contract law and, where applicable, ERISA. 29 U.S.C. 1102(a)(1). Form 700 thus is necessary not only to trigger the regulatory obligation of the insurer or TPA to provide contraceptive coverage to the organization's employees, but also to "ensure[] that there is a party with legal authority"—both contractually and under ERISA—to make payments to plan beneficiaries for contraceptive services. 78 Fed. Reg. at 39,880. Additionally, only upon execution of this form does the insurer or TPA become authorized and legally obligated to provide such coverage, and (in the case of a TPA) eligible for 115% reimbursement for doing so. See 79 Fed. Reg. 13,744, 13,809 (Mar. 11, 2014).

As HHS has acknowledged, forcing an employer to amend its plan documents to create this authority and obligation does not create "two separate health insurance policies." 78 Fed. Reg. at 39,876. Indeed, the government would not be able to use ERISA to help accomplish its goals if it were not regulating a benefit plan provided by an employer. 29 U.S.C. 1002. Instead, the "accommodation" is designed to effectuate contraceptive coverage from *inside* the employer's "insurance coverage network," to take advantage of the existing "coverage administration infrastructure." 80 Fed. Reg. at 41,328. In short, it is designed to force a religious employer to allow its own plan to be used to facilitate access to the very contraceptive coverage that it finds religiously objectionable.

The Little Sisters and this Court's Injunction

Unsurprisingly, religious organizations found little solace in this "accommodation." After all, these organizations do not merely object to paying for or being the direct provider of contraceptive coverage; they object to facilitating, or being complicit in, access to contraceptives; to paving the way for contraceptives to be provided under their plans; and to directly transferring their own obligations onto others. Being forced to "comply" with the mandate via the regulatory "accommodation" is no more compatible with their religious beliefs than being forced to comply with that mandate directly.

The Little Sisters are one group raising such objections. The Little Sisters are part of an international order of Catholic nuns whose faith inspires them to spend their lives serving the sick and elderly poor. Each Little Sister takes a vow of obedience to God and of hospitality "to care for the aged as if they were Christ himself." LSP C.A.App.149a, 151a. The Little Sisters treat each "individual with the dignity they are due as a person loved and created by God," and strive to "convey a public witness of respect for life, in the hope that [they] can build a Culture of Life in our society." LSP C.A.App.152a.

The Little Sisters provide health benefits through Christian Brothers Employee Benefit Trust (Trust), a self-insured church plan. A "church plan" is a benefit plan established by a church to serve its employees and other nonprofit religious organizations that share "common religious bonds and convictions." 29 U.S.C. 1002(33); 26 U.S.C. 414(e). The Trust's church plan is open only to nonprofits in good standing with

the Roman Catholic Church and approved for listing in *The Official Catholic Directory*. LSP C.A.App.165a. The plan is administered by petitioner Christian Brothers Services, a Catholic organization that serves other Catholic organizations by helping them to "remain faithful to [their] mission and the universal mission of the Catholic Church." LSP C.A.App.166a. Consistent with the sincerely held religious beliefs of the Catholic Church, the Trust does not provide contraceptive coverage. LSP C.A.App.169a.

When HHS was considering religious objections to its contraceptive mandate, commenters repeatedly requested that church plan participants be exempted from compliance.[1] HHS refused. Nonexempt employers who use a church plan therefore must comply with the mandate, either including contraceptive coverage in their plan or executing documents authorizing others to use their plan infrastructure to facilitate that coverage. 80 Fed. Reg. at 41,344; 26 C.F.R. 54.9815-2713A(a)(3).

There is, however, one important difference as to church plans. Because church plans are exempt from ERISA, 29 U.S.C. 1003(b)(2), HHS claims that it lacks authority to compel a church plan's TPA to comply with the obligation to provide contraceptive coverage that arises if an employer that utilizes the plan self-certifies. In HHS's own view, forcing an em-

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[1] Letter, Church Alliance to Dep't of Labor (Oct. 27, 2014) (summarizing comments submitted from 2011 to 2014) http://church-alliance.org/sites/default/files/images/u2/Comment-Letter-ACA-Preventive-Services-IFR-10-27-14.pdf.

ployer that uses a church plan to self-certify will not necessarily result in the provision of contraceptive coverage to its employees. This is a case in point. Christian Brothers Services has made clear that, because of its own religious objections, it would not comply with the obligation to provide contraceptive coverage if the Little Sisters were to self-certify, and HHS has disclaimed any enforcement authority to force it to do so. Nonetheless, HHS still insists that the Little Sisters must comply with the mandate via the "accommodation" even though HHS does not dispute either that they have a sincere religious objection to doing so, or that their objection exists independently of whether doing so will result in the provision of contraceptive coverage to their employees. LSP C.A.App.160a, 343a-48a, 352a-53a.[2]

The Little Sisters and Christian Brothers brought suit on behalf of themselves and a class of all employers in the Trust alleging that forcing them to comply with the mandate via the "accommodation" violates, among other things, their religious freedom rights under RFRA. After both the district court and

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[2] It is not necessarily true, moreover, that complying via the regulatory option would *not* result in the use of the Little Sisters' plan to facilitate provision of contraceptive coverage. As HHS conceded below, if the Little Sisters execute the requisite paperwork, HHS will consider itself empowered to convince *any* third party with which the Trust contracts to utilize the Little Sisters' plan to facilitate the provision of contraceptive coverage. LSP C.A.Tr.51:2-19; RSI C.A.Tr.18:2-19 (admitting at oral argument that HHS "will make that offer to Express Scripts"). Express Scripts is the Trust's prescription provider and does not share the Trust's religious objections. LSP C.A.App.495a.

the Tenth Circuit refused to grant preliminary injunctive relief mere days before fines would begin accruing, the Little Sisters turned to this Court for relief. This Court responded by issuing a rare injunction under the All Writs Act excusing them from executing Form 700 and ordering:

> If the employer applicants inform the Secretary of Health and Human Services in writing that they are non-profit organizations that hold themselves out as religious and have religious objections to providing coverage for contraceptive services, the respondents are enjoined from enforcing against the applicants the challenged provisions of the [ACA] and related regulations pending final disposition of the[ir] appeal.

App.150a. The Court subsequently ordered similar relief in *Wheaton College* v. *Burwell*, 134 S.Ct. 2806 (2014).

The "Augmented" Regulatory Method for Compliance with the Contraceptive Mandate

HHS responded to this Court's injunctions by revising its regulation in form but not substance, and continuing to require objecting nonprofits to execute documents that HHS deems sufficient for compliance with the mandate. Specifically, HHS "augmented" the regulation to allow a nonprofit to communicate its objection through HHS instead of directly to its insurer or TPA. Just as with Form 700, however, this method of compliance is not an exemption. Nor, unlike the relief this Court ordered, does it consist solely of informing HHS of a religious objection. Instead,

like Form 700, it creates "an instrument under which the plan is operated." App.264a.

To that end, the notice must inform HHS of the name and type of the employer's health plan, as well as "the name and contact information for any of the plan's [TPAs]." 80 Fed. Reg. at 41,344. "If" the religious organization submits this "necessary" information, HHS "will send a separate notification to" its insurer or TPA informing of its new "obligations" to provide contraceptive coverage to participants in the organization's plan and its designation as a plan and claims administrator for that purpose. 79 Fed. Reg. 51,092, 51,095 (Aug. 27, 2014); 29 C.F.R. 2510.3-16(b). If the employer takes these steps, it will authorize the use of its plans to provide no-cost access to the contraceptives, and HHS will deem the employer in compliance.

Whether an employer executes Form 700 or provides notice and information to HHS, "[t]he result is the same." *East Tex. Baptist Univ.* v. *Burwell,* No. 14-20112, 2015 WL 3852811, at *2 (5th Cir. June 22, 2015) (*"ETBU"*). The religious organization is deemed to have complied with the mandate to provide coverage to which it objects; its own healthcare plan becomes the vehicle for facilitating that coverage; and its own certification or notice serves as the legal "instrument" that triggers and authorizes provision of and reimbursement for that coverage. Only by taking the affirmative act of executing a legal "instrument" that puts itself in that position can a religious organization avoid massive financial penalties for excluding any contraceptives from its plan.

The Tenth Circuit Proceedings

After obtaining the injunction pending appeal from this Court, the Little Sisters and Christian Brothers proceeded with their appeal of the district court's denial of injunctive relief, and the Tenth Circuit aligned oral argument on that appeal with HHS's appeal of preliminary injunctive relief in another case, *Reaching Souls Int'l, Inc.* v. *Burwell*, No. 14-6028 (10th Cir.).[3]

Like the *Little Sisters* case, the *Reaching Souls* case involves both a church plan (GuideStone) and a class of religious employers who use that plan. Because plan sponsor GuideStone and those employers object to the four forms of contraception that can act as abortifacients, the plan does not provide coverage for those forms of contraception. RSI C.A.App.A162-71, A181-83, A190-91. The largest TPA with which GuideStone contracts has stated that should any of the employers who use GuideStone comply with the contraceptive mandate via the "accommodation," the TPA will communicate to that organization's employees (and their female beneficiaries, starting at age 10) that those abortifacients are available through the GuideStone plan. RSI C.A.App.A317, A321. And the TPA would facilitate that coverage by using GuideStone's plan infrastructure to contact all participants, identify participants by "payroll location," and perform "[o]ngoing, nightly feeds" of information. RSI C.A.App.A321.

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[3] The court also aligned argument in another HHS appeal. *Southern Nazarene Univ.* v. *Burwell*, No. 14-6026 (10th Cir.).

After hearing argument, the Tenth Circuit rejected petitioners' claims. As to their RFRA claims, the court accepted petitioners' uncontested testimony that "the accommodation scheme violates their sincerely held religious beliefs" that they may not be "complicit in providing contraceptive coverage." App.35a, 38a, 48a. And the court agreed that if petitioners do not comply, either directly or via the "accommodation," they will face massive penalties. But the majority nonetheless found no substantial burden because it "assesse[d] and ultimately reject[ed] the merits of" petitioners' sincere religious beliefs that complying via the "accommodation" would force them to be morally complicit in providing contraceptive coverage; instead, in the court's eyes, doing so would "relieve them from complicity." App.48a & n.20. The court also rejected petitioners' Free Exercise and Establishment Clause claims.

Judge Baldock dissented in part. He expressed considerable doubt that courts may "question[] a religious adherent's understanding of the significance of a compelled action," App.124a, and even if courts could so question, he concluded that the "accommodation" would violate RFRA as to self-insured employers. In his view, because "the government needs the self-insured plaintiffs to commit an act to further its contraceptive coverage efforts," the accommodation route imposes "a substantial burden on their religious exercise" even under the majority's conception of the analysis. App.137a, 146a. But because he accepted "for argument's sake" that a plaintiff must show that the actions forbidden by its religion would "necessarily cause" contraceptive coverage to demonstrate a substantial burden, he concluded that the

Little Sisters' RFRA claim fails because Christian Brothers Services does not intend to provide contraceptive coverage should the Little Sisters comply via the "accommodation." App.145a.

REASONS FOR GRANTING THE PETITION

I. This case presents an exceptionally important question.

This case presents a question of profound and nationwide importance. There is no dispute that thousands of religious organizations throughout the country sincerely believe that complying with the mandate to provide healthcare coverage that includes abortifacients and contraceptives, either directly or via the "accommodation," violates their religious beliefs. And there is no dispute that unless these religious employers comply, they will face massive financial penalties. In short, there is no dispute that many religious ministries are being forced to choose between violating their sincere religious beliefs or violating federal law.

Understandably, this unprecedented situation has generated an unprecedented volume of litigation. Hundreds of religious institutions representing a wide cross-section of organizations and faiths have brought lawsuits seeking relief from the untenable position in which HHS has put them.[4] None of this

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[4] See Becket Fund for Religious Liberty, *HHS Mandate Information Central*, http://www.becketfund.org/hhsinformationcentral/; National Women's Law Center, *Challenges to the Birth Control Coverage Benefit*, http://www.nwlc.org/status-lawsuits-challenging-affordable-care-acts-birth-control-coverage-benefit.

should be surprising. Traditionally, the government has steered clear of mandating coverage as religiously sensitive as contraceptives and abortifacients, and has provided generous conscience clauses when mandates threaten to intrude upon religious beliefs, thus leaving religious organizations free to decide how to provide their employees with healthcare plans that comply with their religious beliefs.

The promulgation of a regulatory mandate requiring a wide swath of religious employers to provide healthcare coverage that includes contraceptives and abortifacients changed all that. Religious employers made it perfectly clear to HHS that compliance with this unprecedented regulatory mandate would violate their sincerely held beliefs. Yet HHS refused to exempt them, even though thousands of other employers have been exempted for reasons ranging from religious conscience to administrative convenience. Instead, HHS created only an alternative method for those employers to *comply* with the mandate to provide the coverage that HHS desires and that the employers' religions forbid. Religious employers once again made clear that providing such coverage, whether directly or via the "accommodation," would violate their religion.

Many of the lawsuits that followed, including one of the two cases here, met with success in the district courts. But in contrast to the district courts that found a RFRA violation based on a straightforward application of *Hobby Lobby*, the Third, Fifth, Seventh, D.C., and now Tenth Circuits concluded that using substantial penalties to force religious employers to comply with the mandate via the "accommoda-

tion" does not violate RFRA, even though doing so undisputedly would violate their sincere religious beliefs. Courts have done so, moreover, by employing a substantial burden analysis virtually identical to the reasoning this Court squarely rejected in *Hobby Lobby* and cases before it. See *infra* Part II. Those circuit decisions are profoundly flawed, but what matters at this juncture is not who is correct about the ultimate merits of this important and recurring nationwide controversy. What matters now is that, as a consequence of decisions like the one below, religious employers throughout the nation face the imminent prospect of being forced to choose between violating their sincere religious beliefs or violating the ACA.

That is reason enough for this Court to intervene now, rather than to allow this exceptionally important question to "percolate" while ministries face the abandonment of the free exercise rights that RFRA guarantees. This Court has already recognized—repeatedly—that this extraordinary situation demands extraordinary action. Three times, including once at the behest of the Little Sisters, the Court has been asked to provide extraordinary relief under the All Writs Act to prevent a religious nonprofit from being forced to comply with the mandate through HHS's "accommodation" before exhausting judicial review. And three times, this Court has complied, most recently by issuing an injunction pending resolution of a petition for *certiorari* challenging HHS's "augmented accommodation" in *Zubik* v. *Burwell*, 576 U.S. ---, 2015 WL 3947586 (June 29, 2015). See also App.261a; *Wheaton*, 134 S.Ct. 2806. As the Court has thus recognized, the stakes are simply too high to allow HHS to begin enforcing its novel regu-

latory scheme before its legality has been fully and finally litigated.

And this case is a particularly appropriate vehicle for this Court to play its essential role in that process. While petitioner Reaching Souls faces the more familiar dynamic in which compliance with HHS's regulatory demands will more likely accomplish HHS's regulatory goal of ensuring the provision of no-cost contraceptives via petitioner's plan, HHS's position vis-à-vis petitioner Little Sisters illustrates HHS's insistence that sincerely held religious beliefs must yield even when HHS says its regulatory objectives cannot be enforced. HHS has insisted that even if the Little Sisters sign the paperwork authorizing and obligating their TPA to provide their employees with contraceptive coverage, the government still cannot ensure that coverage will be provided because it currently lacks enforcement authority to do so. HHS seems to think that its current inability to achieve its regulatory objective somehow defeats the Little Sisters' religious objection.[5] In reality, since the government concedes the sincerity of Little Sisters' objection to filling out the requisite forms, HHS demonstrates only its willingness to override sincere religious beliefs even when it thinks doing so does not further its interests in the least. If nothing else, RFRA and the First Amendment must mean that the government cannot penalize religious institutions for no reason at all. Yet even in that circumstance, HHS still refuses to relent. Thus, as applied to Little Sis-

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[5] But see note 2, *supra*.

ters, the contraceptive mandate is as clear a RFRA violation as one can imagine.

That makes this Court's review of this particular case essential. Even accepting for the sake of argument the premise that the regulatory compliance method might survive a least restrictive means analysis when compliance will likely result in the provision of no-cost contraceptives (as in the Reaching Souls scenario), but see *infra* pp. 31-33, it certainly cannot survive that exceptionally demanding test when the government claims that overriding sincere religious beliefs will not even accomplish the government's objective (as in the Little Sisters scenario). This petition allows the Court to consider both scenarios together, rather than just the Reaching Souls scenario common to other petitions.[6] But even if this Court grants *certiorari* in one of the other pending petitions, it should grant the instant petition to ensure that HHS's insistence on overriding sincere religious beliefs even when it says its regulatory objective is unattainable does not escape this Court's review.

But ultimately, whether through this petition alone or some combination of petitions, what matters is that the Court resolve this exceptionally important

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[6] Moreover, this petition is unique in that it involves claims not just by employers, but also by the church plans themselves (the Trust and GuideStone) as well as a TPA (Christian Brothers Services), thereby ensuring the Court the fullest insight into how the "accommodation" appropriates a church plan's "coverage administration infrastructure." 80 Fed. Reg. 41,322 n.22, 41,328; see also RSI C.A.App.A317-A322.

question, and do so now. The arguments for each side have been exhaustively briefed and thoroughly considered by courts across the country, and hundreds of petitioners now stand before this Court. Unless they receive relief from this Court, they are out of options; they will be forced to choose between compliance with the mandate or compliance with their religious beliefs. That is precisely the type of impossible choice that Congress intended RFRA to protect against in all but the narrowest of circumstances. This Court should not let that extraordinary result come to pass without deciding for itself whether HHS's unprecedented effort to override sincere religious objections to actions that HHS itself considers sufficient to comply with the mandate can be reconciled with RFRA.

II. The decision below is exceptionally wrong.

This Court's intervention is all the more essential because the decision below is profoundly wrong. Indeed, the reasoning the Tenth Circuit employed in concluding that HHS has not imposed a substantial burden on petitioners' exercise of religion is impossible to reconcile with *Hobby Lobby* and decades of substantial burden cases before it.

1. As noted, there is no dispute that petitioners sincerely believe that complying with the mandate, whether directly or via the "accommodation," is forbidden by their religions. Nor is there any dispute that failure to comply will result in massive fines. That should be the end of the substantial burden analysis, as forcing petitioners to choose between taking an action that they sincerely believe would violate their religion or "pay[ing] an enormous sum of

money" "clearly imposes a substantial burden on" their exercise of religion. *Hobby Lobby*, 134 S.Ct. at 2779. That is so whether or not courts *agree* with petitioners that the action would (or should) violate their religion. And it is particularly so where, as here, the *reason* HHS states for needing compliance (namely, to expand contraceptive access) exactly matches petitioners' religious concerns.

Yet the Tenth Circuit still refused to accept that HHS has imposed a substantial burden on petitioners' religious exercise. In doing so, the panel did not dispute that petitioners sincerely believe that compliance with the mandate via the regulatory method would force them to facilitate contraceptive coverage in violation of their religious beliefs, or that the consequences of non-compliance are massive penalties. Instead, the court insisted that the substantial burden analysis turns not on whether petitioners are being pressured to take religiously forbidden actions, but rather on whether, in the court's view, the religiously objectionable law adequately relieves them of moral complicity. The court thus rejected petitioners' RFRA claims because it concluded that they are simply wrong to believe that "the administrative tasks required to opt out of the Mandate make them complicit in the overall delivery scheme." App.48a. Unlike petitioners, the court thought that complying with the "accommodation" scheme actually "relieves [petitioners] from complicity," App.48a, and in any event is not very burdensome because it requires only "routine and minimal administrative paperwork." App.91-92a.

That approach—judges telling nuns how to analyze moral complicity—cannot be reconciled with this Court's substantial burden jurisprudence. "[I]t is not within the judicial function and judicial competence to inquire whether" someone who sincerely objects to a law on religious grounds has "correctly perceived the commands of [his] * * * faith." *Thomas* v. *Review Bd.*, 450 U.S. 707, 716 (1981). After all, "[c]ourts are not arbiters of scriptural interpretation," and they are "singularly ill equipped" to make sensitive decisions about what does or does not interfere with religious beliefs—*e.g.*, whether the degree of complicity required is religiously problematic. *Id.* at 715-16. This Court has made clear that "[h]eresy trials are foreign to our Constitution" and religious groups "may believe what they cannot prove." *United States* v. *Ballard*, 322 U.S. 78, 86 (1944). The only questions for courts to resolve in the substantial burden analysis are whether a religious belief is sincerely held and, if so, whether the "pressure" the government has "put[] * * * on an adherent to modify his behavior and to violate his beliefs" is "substantial." *Thomas*, 450 U.S. at 718; see also *United States* v. *Lee*, 455 U.S. 252, 257 (1982).

Hobby Lobby eliminated any doubt on that score. Just as here, "HHS's main argument" concerning substantial burden in *Hobby Lobby* "[wa]s basically that the connection between what the objecting parties must do * * * and the end that they find to be morally wrong * * * [wa]s simply too attenuated." 134 S.Ct. at 2777. Rather than resolve that argument as part of its substantial burden analysis, the Court found it entirely misplaced, as it "addresses a very different question that the federal courts have no

business addressing," and that the Court itself has "repeatedly refused" to answer. 134 S.Ct. at 2778 (collecting cases). The "difficult and important question" of where to draw "the line" as to what is "consistent with [one's] religious beliefs"—including how much facilitation or complicity is too much—is for the religious adherent alone to answer. *Ibid.* The only questions the Court found relevant to its substantial burden analysis were whether "the line drawn" by the challengers "reflect[ed] an honest conviction" and, if so, whether HHS had substantially pressured them to cross that line. *Ibid.* And, the Court concluded, putting employers to the choice of crossing that line or "pay[ing] an enormous sum of money" unquestionably substantially pressures them to cross that line. *Id.* at 2779.

That same reasoning compels the conclusion that the nonprofit compliance method imposes a substantial burden. Indeed, the burden here is not just analogous to the burden in *Hobby Lobby*; it is identical. The ultimate statutory obligation with which petitioners must comply remains the contraceptive mandate, and the penalties for failure to do so—whether directly or via the "accommodation"—are the same as those faced by the for-profit employers in *Hobby Lobby*. The only difference is that HHS has given petitioners a method for fulfilling the mandate that was not initially offered to for-profit corporations. But as long as petitioners have sincere religious objections to the proffered means of fulfilling the mandate, then the existence of a substantial burden follows ineluctably from *Hobby Lobby*.

Indeed, several judges have recognized as much. See, *e.g.*, *Eternal Word Television Network* v. *Sec'y, U.S. Dep't of Health & Human Servs.*, 756 F.3d 1339, 1348 (11th Cir. 2014) (Pryor, J., concurring) ("*EWTN*") ("So long as the [religious organization's] belief is sincerely held and undisputed—as it is here—we have no choice but to decide that compelling the participation of the [organization] is a substantial burden on its religious exercise."); *Priests for Life* v. *U.S. Dep't of Health & Human Servs.*, No. 13-5368, (D.C. Cir. 2015), slip op. 10 (Kavanaugh, J., dissenting from denial of rehearing en banc) ("*PFL*") ("we may not question the wisdom or reasonableness (as opposed to the sincerity) of plaintiffs' religious beliefs—including about complicity in wrongdoing"); *University of Notre Dame* v. *Sebelius*, 743 F.3d 547, 566 (7th Cir. 2014) (Flaum, J., dissenting), vacated and remanded, 135 S.Ct. 1528 (2015) (whether the "accommodation" imposes a substantial burden "is not a question of legal causation but of religious faith"); *cf.* App.123a (Baldock, J., dissenting in part) ("learned judges have argued compellingly that, under [*Hobby Lobby*], the amount of coercion the government uses to force a religious adherent to perform an act she sincerely believes is inconsistent with her understanding of her religion's requirements is the only consideration relevant to whether a burden is 'substantial' under RFRA").

Unfortunately, when it comes to nonprofit challenges to the contraceptive mandate, adherence to the clear teachings of *Hobby Lobby* and *Thomas* has become a feature more common to dissenting opinions than majorities. Indeed, each of the five courts of appeals that have resolved such challenges (including

the Tenth Circuit here) has employed a substantial burden analysis reminiscent of *Hobby Lobby* dissenters. See *ETBU*, 2015 WL 3852811, at *5 (finding no substantial burden because "the acts [religious objectors] are required to perform do not include providing or facilitating access to contraceptives"); *Geneva Coll.* v. *Sec'y, U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 435 (3d Cir. 2015) (insisting that RFRA requires courts to "objectively assess whether the appellees' compliance with the self-certification procedure does, in fact * * * make them complicit" in facilitating coverage); *University of Notre Dame* v. *Burwell*, 786 F.3d 606, 611-12 (7th Cir. 2015) (Posner, J.) (*"Notre Dame II"*) ("[it] is for the courts to determine whether the law actually forces [employers] to act in a way that would violate [their] beliefs"); *Wheaton Coll.* v. *Burwell*, No. 14-2396, 2015 WL 3988356, at *7 (7th Cir. July 1, 2015) (Posner, J.) ("No one is asking Wheaton to violate its religious beliefs."); *Priests for Life* v. *U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 237, 247 (D.C. Cir. 2014) (insisting that "accommodation" route requires only "a bit of paperwork" that "wash[es] [employers'] hands of any involvement in providing [contraceptive] coverage").

Like the decision below, those cases simply cannot be reconciled with this Court's repeated admonition that "[i]t is not within 'the judicial function and judicial competence'" to decide the "proper interpretation" of religious beliefs or "speculate whether" the peculiarities of a law's operation "ease or mitigate the perceived sin of participation." *Lee*, 455 U.S. at 257, 261 n.12 (quoting *Thomas*, 450 U.S. at 716). Just this past Term, applying RLUIPA's identical substantial burden test, this Court found it sufficient that an in-

mate demonstrated that he would "face serious disciplinary action" if forced to shave a beard that he sincerely believed his religion required. *Holt* v. *Hobbs*, 135 S.Ct. 853, 862 (2015). The Court spent no time evaluating whether maintaining a half-inch beard was necessary or sufficient to comply with a "dictate of [petitioner's] religious faith." *Ibid.* Nor did it focus on the fact that shaving takes only a few minutes. It was enough that petitioner's belief was sincere and that the government had substantially pressured him to violate it.

Holt also reiterated that it makes no difference whether the challenger remains "able to engage in *other* forms of religious exercise," *ibid.* (emphasis added), as RFRA protects "any exercise of religion," not merely partial or compromised exercises. 42 U.S.C. 2000cc-5(7)(A). That the regulatory method "provides an alternative" means of compliance with the contraceptive mandate that avoids *one* religious objection (*i.e.*, direct payment) is of no moment since the "alternative itself imposes a substantial burden." *PFL*, slip op. 14 (Kavanaugh, J., dissenting). But see App.42a-44a (suggesting that a less stringent analysis applies when government purports to be "accommodating" religious exercise). And when, as here, the alternative violates religious beliefs that are every bit as sincere as those at stake in *Hobby Lobby*, then *Hobby Lobby* plainly controls the substantial burden inquiry. That the Tenth Circuit (and others) failed to recognize as much is proof enough of the need for this Court's review.

2. To make matters worse, courts not only have impermissibly arrogated to themselves authority to

answer "a difficult and important question of religion and moral philosophy," *id.* at 2778, but have failed to grasp the true nature of the religious objections. These cases are not about whether HHS may force religious employers to execute "routine and minimal administrative paperwork." App.91a-92a. Nor are they about whether religious employers may prevent employees from obtaining access to contraceptives. They are about whether HHS may force objecting religious employers to comply with a mandate to provide contraceptive coverage to their employees in a "seamless" way, by interjecting that coverage into the employer's own "insurance coverage network" and utilizing the plan's own "coverage administration infrastructure." 80 Fed. Reg. at 41,328.

HHS would seem to be poorly positioned to question that its compliance method involves a meaningful degree of complicity or facilitation. After all, HHS does not view its "accommodation" as an exemption from its regulatory mandate. Instead, the required documentation is viewed as a means both of expanding contraceptive access and of complying with the mandate. Having concluded that its "accommodation" is good enough (as a matter of administrative law) to put petitioners in compliance with their regulatory and statutory obligations to provide no-cost contraceptive coverage, it takes real chutzpah for HHS to then insist that this same "accommodation" involves no meaningful facilitation or complicity in the provision of that coverage. The "accommodation" cannot simultaneously "ensure" contraceptive coverage and have nothing to do with it. In any case, it is all well and good for HHS to think *it* has threaded the needle and found a way for religious nonprofits to comply

with the mandate without violating their religious beliefs, but ultimately it is for the religious adherent to determine how much facilitation or complicity is too much.

Just like its need to ensure that its "accommodation" complies with the ACA, HHS's need to ensure that its "accommodation" complies with ERISA (as well as the APA and HIPPA) likewise ensures that the degree of complicity and facilitation is substantial. That much is clear from the fact that the form or notice HHS requires employers to execute serves as "an instrument under which [its healthcare] plan is operated." App.264a. That instrument is essential to "ensure[] that there is a party with legal authority" to make payments for contraceptive services, 78 Fed. Reg. at 39,880, as a TPA would have no contractual authority to pay claims without it—or legal authority to either use plan information for that purpose or seek government reimbursement for doing so. It is that "gate-opening act" of executing that instrument—not the independent actions of any third parties—that petitioners sincerely believe would violate their religious beliefs. See App.138a (Baldock, J., dissenting in part). The situation thus is not meaningfully different from one in which the government mandates that all hospitals perform abortions, but purports to "accommodate" religious hospitals by requiring them to sign a form authorizing doctors supplied and paid by the government to perform abortions in the hospitals' surgical suites. It is not hard to see why a hospital would find little solace in the government's moral analysis that it is not "facilitating" abortion because its own doctors are not the ones

that the hospital has authorized to use its facility to perform abortions.[7]

The Tenth Circuit was therefore simply wrong to insist that HHS's regulatory compliance method would "relieve[] [petitioners] of complicity." App. 48a. Indeed, "if the form were meaningless, why would the government require it?" *PFL*, slip op. 12 (Kavanaugh, J., dissenting). But ultimately, who has the better of the complicity and facilitation arguments is beside the point. What matters under RFRA and this Court's cases is that petitioners *sincerely believe* that complying via the "accommodation" would be sinful, and that HHS nonetheless is exerting substantial economic pressure—the exact same pressure as in *Hobby Lobby*—on petitioners to do so. No matter which petitioner or plan type is at stake, the substantial burden analysis requires nothing more.

3. In employing a fundamentally flawed substantial burden analysis, the Tenth Circuit avoided the only question left open by *Hobby Lobby*—whether the regulatory nonprofit "accommodation" is "the least restrictive means of furthering [a] compelling governmental interest," 42 U.S.C. 2000bb-1. Many of the judges who have reached that question have readily

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[7] And in this hypothetical, the government could hardly save its "accommodation" by insisting that independent obstacles will prevent the doctors from actually showing up at certain hospitals. Even if true, this would not undermine the religious hospitals' objection to signing the form that opens their doors to abortions; it would just mean that the government is impermissibly disregarding religious beliefs even when doing so does not further its objectives.

concluded that it is not. See, *e.g.*, *EWTN*, 756 F.3d at 1349 (Pryor, J., concurring); *PFL*, slip op. 17 (Brown, J., dissenting); *id.* at 23 (Kavanaugh, J., dissenting), *Notre Dame II*, 786 F.3d at 629-30 (Flaum, J., dissenting); App.147a-48a (Baldock, J., dissenting in part).

And with good reason, as HHS has "many ways to increase access to free contraception without doing damage to the religious-liberty rights of conscientious objectors," *Korte* v. *Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013). Most obviously, it could simply "treat employees [of religious objectors] * * * the same as it does employees whose employers provide no coverage" by "providing for subsidized * * * contraceptive coverage * * * on [the] exchanges." *PFL*, slip op. 17 (Brown, J., dissenting). Moreover, it is hard to see how HHS can claim a "compelling interest" in enforcing a mandate that "does not apply to tens of millions of people * * * includ[ing] those working for private employers with grandfathered plans, for employers with fewer than fifty employees," and for certain religious employers. *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114, 1143-44 (10th Cir. 2013); see also *Korte*, 735 F.3d at 686; *Gilardi* v. *U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1220-22 (D.C. Cir. 2013), vacated and remanded, 134 S.Ct. 2902 (2014); *EWTN*, 756 F.3d at 1349 (Pryor, J., concurring). And it is even harder to see how HHS can claim a compelling—or even legitimate—interest in enforcing the mandate over sincere religious objections in the scenario where it says doing so will not even result in the provision of contraceptive coverage.

That makes this Court's review all the more essential, as the Tenth Circuit dodged the least restrictive means analysis by failing to employ the substantial burden test that this Court's precedents demand. And for employers in the Little Sisters' shoes, the substantial burden test really is the end of the RFRA analysis. It is bad enough that HHS's unprecedented effort to force religious employers to take actions that violate their sincerely held religious beliefs escaped meaningful RFRA review in the Tenth Circuit. Petitioners should not be denied meaningful review in this Court as well before being forced to make the untenable choice that HHS has thrust upon them.

III. The "accommodation" discriminates among religious organizations in violation of the Religion Clauses.

This Court should also grant *certiorari* to review the constitutionality of HHS's unprecedented decision to discriminate among religious objectors in doling out exceptions to its contraceptive mandate. Such arbitrary religious discrimination is impermissible, and particularly inappropriate coming from an agency that has neither the authority nor the expertise to decide which religious institutions are sufficiently "religious" to deserve accommodation. Indeed, while RFRA reflects a congressional mandate to accommodate all religious exercise pursuant to broadly applicable principles, HHS has taken it upon itself to exempt certain religious entities, while insisting that others comply, without following any congressional guidance. Small wonder that the result of deviating from RFRA's uniform approach is unconstitutional

cere beliefs be treated on equal terms. And just as the government may not privilege "well-established churches" while disadvantaging "churches which are new and lacking in a constituency," *Larson*, 456 U.S. at 246 n.23, it may not prefer "houses of worship[] and religious orders," 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013), while disfavoring those whose faith "move[s] [its adherents] to engage in" broader religious ministries. *Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008) (McConnell, J.). Such preferences have been "consistently and firmly" rejected. *Larson*, 456 U.S. at 246; *see also Korte*, 735 F.3d at 681 (rejecting argument that "[r]eligious exercise is protected in * * * the house of worship but not beyond" because many "[r]eligious people do not practice their faith in that compartmentalized way"). As the government recently—and successfully—argued, "allow[ing] houses of worship [an exemption], but deny[ing] equal privileges to other, independent [religious] organizations that also have sincerely held religious tenets" would "create a serious Establishment Clause problem." Gov't Amicus Br. at 11, *Spencer* v. *World Vision*, 633 F.3d 723 (9th Cir. 2008) (No. 08-35532).

HHS does not deny that it has discriminated among religious organizations. Instead, it argues that its discrimination is justified because "[h]ouses of worship and their integrated auxiliaries * * * are more likely than other employers to employ people of the same faith," and therefore "less likely" to hire people who need contraceptives. 78 Fed. Reg. at 39,874. But HHS has offered exactly zero factual support for this speculation—and for good reason, as it is just as unfounded as the rationales this Court

rejected in *Larson*, 456 U.S. at 246-51, and *Lukumi*, 508 U.S. at 546-47. The Catholic petitioners' employees all work for openly Catholic institutions approved for listing in *The Official Catholic Directory*, and Reaching Souls and Truett-McConnell require employee statements of faith. LSP C.A.App.165a, RSI C.A.App.A15-17. There is no reason to suspect that the employees of these overtly religious institutions are any more likely to have religious disagreements with their employers than the employees of houses of worship.

Moreover, courts have been rightfully wary of allowing government to "discriminate[] among religious institutions on the basis of the * * * intensity of their belief." *Weaver*, 534 F.3d at 1249. And *HHS* certainly cannot claim either any particular authority or expertise to determine which religious organizations are "religious enough." *Cf. King* v. *Burwell*, No. 14-114, 2015 WL 2473448, at *8 (U.S. June 25, 2015) ("It is especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort."). At the very least, if determinations about who must comply with the mandate are to turn on such religiously sensitive judgments, those determinations should be made by Congress.

But Congress has already spoken in RFRA, which among its many virtues avoids the discrimination among religions that inevitably results from HHS's ad hocery. That countless religious employers not among the happy few exempted by HHS are being forced to comply with the contraceptive mandate despite RFRA is ample cause for this Court's interven-

tion. That, in this case, HHS insists on overriding concededly sincere religious objections even when HHS itself does not believe forced compliance will actually advance its regulatory goals makes the need for this Court's intervention here particularly acute.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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JULY 2015

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

NO. 13-1540

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, a Colorado non-profit corporation; LITTLE SISTERS OF THE POOR, BALTIMORE, INC., a Maryland non-profit corporation, by themselves and on behalf of all others similarly situated; CHRISTIAN BROTHERS SERVICES, a New Mexico non-profit corporation; CHRISTIAN BROTHERS EMPLOYEE BENEFIT TRUST,

PLAINTIFFS - APPELLANTS,

v.

SYLVIA MATHEWS BURWELL, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES; THOMAS E. PEREZ, Secretary of the United States Department of Labor; UNITED STATES DEPARTMENT OF LABOR; JACOB J. LEW, Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF THE TREASURY,

DEFENDANTS - APPELLEES

Appeal from the United States District Court for the District of Colorado (No. 1:13-cv-2611)

NOS. 14-6026 & 14-6028

SOUTHERN NAZARENE UNIVERSITY; OKLAHOMA WESLEYAN UNIVERSITY; OKLAHOMA BAPTIST UNIVERSITY; MID-AMERICA CHRISTIAN UNIVERSITY; REACHING SOULS INTERNATIONAL, INC., an Oklahoma not for profit corporation; TRUETT-MCCONNELL COLLEGE, INC., a Georgia nonprofit corporation, by themselves and on behalf of all others similarly situated; GUIDESTONE FINANCIAL RESOURCES OF THE SOUTHERN BAPTIST CONVENTION, a Texas nonprofit corporation,

PLAINTIFFS - APPELLEES,

v.

SYLVIA MATHEWS BURWELL, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES; THOMAS E. PEREZ, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF LABOR; JACOB J. LEW, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF THE TREASURY,

DEFENDANTS - APPELLANTS.

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67 CATHOLIC THEOLOGIANS AND ETHICISTS; ALABAMA PHYSICIANS FOR LIFE; AMERICAN

ASSOCIATION OF PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AMERICAN BIBLE SOCIETY; AMERICAN CENTER FOR LAW AND JUSTICE; AMERICAN CIVIL LIBERTIES UNION OF COLORADO; AMERICAN CIVIL LIBERTIES UNION OF OKLAHOMA; AMERICAN CIVIL LIBERTIES UNION; AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME); AMERICAN PUBLIC HEALTH ASSOCIATION; AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; ASIAN & PACIFIC ISLANDER AMERICAN HEALTH FORUM; ASIAN AMERICANS ADVANCING JUSTICE | AAJC; ASIAN AMERICANS ADVANCING JUSTICE | LOS ANGELES; ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS; ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL; ASSOCIATION OF GOSPEL RESCUE MISSIONS; BLACK WOMEN'S HEALTH IMPERATIVE; CALIFORNIA WOMEN'S LAW CENTER, NATIONAL WOMEN'S LAW CENTER; CALIFORNIA WOMEN'S LAW CENTER; CATHOLIC MEDICAL ASSOCIATION; CHRISTIAN LEGAL SOCIETY; CHRISTIAN MEDICAL ASSOCIATION; CHRISTIE'S PLACE; CONCERNED WOMEN FOR AMERICA; DR. R. ALBERT MOHLER, JR.; ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; FEMINIST MAJORITY FOUNDATION; FORWARD TOGETHER; HIV LAW PROJECT; IBIS REPRODUCTIVE HEALTH; INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE AND CHRISTIAN LEGAL SOCIETY; INTERNATIONAL MISSION BOARD OF THE

SOUTHERN BAPTIST CONVENTION; IPAS; LEGAL MOMENTUM; LIBERTY COUNSEL; LIBERTY UNIVERSITY; LIBERTY, LIFE, AND LAW FOUNDATION; LUTHERAN CHURCH - MISSOURI SYNOD; MERGER WATCH; NARAL PRO-CHOICE AMERICA; NARAL PRO-CHOICE COLORADO; NARAL PRO-CHOICE WYOMING; NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM; NATIONAL ASSOCIATION OF CATHOLIC NURSES; NATIONAL ASSOCIATION OF EVANGELICALS; NATIONAL ASSOCIATION OF PRO LIFE NURSES; NATIONAL CATHOLIC BIOETHICS CENTER; NATIONAL FAMILY PLANNING & REPRODUCTIVE HEALTH ASSOCIATION; NATIONAL HEALTH LAW PROGRAM; NATIONAL LATINA INSTITUTE FOR REPRODUCTIVE HEALTH; NATIONAL ORGANIZATION FOR WOMEN (NOW) FOUNDATION; NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES; NATIONAL WOMEN AND AIDS COLLECTIVE; NATIONAL WOMEN'S HEALTH NETWORK; NATIONAL WOMEN'S LAW CENTER; PLANNED PARENTHOOD ASSOCIATION OF UTAH; PLANNED PARENTHOOD OF KANSAS AND MIDMISSOURI; PLANNED PARENTHOOD OF THE HEARTLAND; PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS, INC.; POPULATION CONNECTION; PRISON FELLOWSHIP MINISTRIES; RAISING WOMEN'S VOICES FOR THE HEALTH CARE WE NEED; SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU); SEXUALITY INFORMATION AND EDUCATION COUNCIL OF THE U.S. (SIECUS); SOUTHERN BAPTIST THEOLOGICAL SEMINARY; UNITED STATES CONFERENCE OF

CATHOLIC BISHOPS,
AMICI CURIAE.

Appeal from the United States District Court for the District of Colorado (D.C. No. 1:13-CV-02611-WJM-BNB) & The United States District Court for the Western District of Oklahoma (D.C. Nos. 5:13-CV-01015-F & 5:13-CV-01092-D)

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Adam C. Jed, Attorney, Appellate Staff, Civil Division (Stuart F. Delery, Assistant Attorney General; Sanford C. Coats and John F. Walsh, United States Attorneys; Beth S. Brinkmann, Deputy Assistant Attorney General; Mark B. Stern, Alisa B. Klein, Patrick G. Nemeroff, and Megan Barbero, Attorneys, Appellate Staff Civil Division, with him on the briefs), United States Department of Justice, Washington, DC, appearing for Sylvia Mathews Burwell, United States Department of Health and Human Services,

Thomas E. Perez, Jacob J. Lew, and United States Department of the Treasury.

Gregory S. Baylor, Alliance Defending Freedom, Washington, DC (Matthew W. Bowman, Alliance Defending Freedom, Washington, DC, David A. Cortman, Alliance Defending Freedom, Lawrenceville, Georgia, and Kevin H. Theriot, Alliance Defending Freedom, Leawood, Kansas, with him on the briefs), appearing for Southern Nazarene University, Oklahoma Wesleyan University, Oklahoma Baptist University, and Mid-America Christian University.

Before MATHESON, MCKAY, and BALDOCK, Circuit Judges.

MATHESON, Circuit Judge.

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GLOSSARY

This opinion is heavily laden with terms from the applicable statute and regulations, types of health insurance arrangements, and names of numerous entities. We appreciate the challenge this presents to the reader and provide this glossary to help navigate the opinion.

Legal and Regulatory Terms:

ACA: The Affordable Care Act, which encompasses the Patient Protection and Affordable Care Act, enacted on March 23, 2010, and the Health Care and Education Reconciliation Act, enacted on March 30, 2010.

Accommodation scheme: A regulatory mechanism that allows religious non-profit organizations to relieve themselves of their obligation to provide contraceptive coverage for employees by either (a) sending a form to their health insurance issuer or third-party administrator or (b) sending a notification to the Department of Health and Human Services.

ANPRM: Advance Notice of Proposed Rulemaking, which an administrative agency may issue to notify the public it is contemplating rulemaking and to invite comments.

Departments: The Department of Health and Human Services, Department of Labor, and Department of

the Treasury, which collectively implement the ACA.

EBSA: The Employee Benefits Security Administration, an agency within the Department of Labor.

ERISA: The Employee Retirement Income Security Act, codified at 29 U.S.C. § 1001 *et seq.*, which is a federal law that sets minimum standards for certain employer-sponsored benefit plans.

Form 700: A standardized notification that religious non-profit organizations may send to their health insurance issuer or third party administrator under the accommodation scheme to self-certify they object to providing contraceptive coverage.

HHS: The Department of Health and Human Services, which is one of the three departments tasked with implementing the ACA and contraceptive coverage requirement.

HRSA: The Health Resources and Services Administration, an agency within HHS, which issued guidelines requiring coverage of all FDA-approved contraceptive methods under the ACA.

IOM: The Institute of Medicine, an independent body that reviewed evidence on women's preventive services and issued a report used by the HRSA in formulating its guidelines.

IRC: The Internal Revenue Code, codified at 26 U.S.C. § 1 *et seq.*, which is a comprehensive compilation of the federal tax laws.

Mandate: Regulations enacted under the ACA requiring employer-sponsored group health plans

to cover contraceptive services for women as a form of preventive care.

RFRA: The Religious Freedom Restoration Act, codified at 42 U.S.C. § 2000bb-1 *et seq.*, which states that laws that substantially burden a person's exercise of religion are only permissible if they are the least restrictive means of furthering a compelling governmental interest.

RLUIPA: The Religious Land Use and Institutionalized Persons Act, codified at 42 U.S.C. § 2000cc *et seq.*, which states that laws that substantially burden religious exercise through land use restrictions or restrictions on prisoners are only permissible if they are the least restrictive means of furthering a compelling governmental interest.

Religious employers: As defined by reference to §§ 6033(a)(3)(A)(i) or (iii) of the IRC, employers that are organized and operate as non-profit entities and are churches, their integrated auxiliaries, conventions or associations of churches, or the exclusively religious activities of any religious order.

Religious non-profit organizations: Organizations that do not qualify as religious employers but are eligible for an accommodation from the contraceptive coverage requirement because they have religious objections to providing contraceptive coverage, are organized and operate as non-profit entities, hold themselves out as religious organizations, and self-certify that they satisfy these criteria. The Plaintiffs in these cases are religious non-profit organizations.

Health Insurance Terms:

Group health plan: A benefit plan established or maintained by an employer that provides health insurance to employees and their dependents either directly—a self-insured group health plan—or through a health insurance issuer—an insured group health plan.

Health insurance issuer: A health insurance company, service, or organization that must be licensed to engage in the insurance business and is subject to state laws regulating insurance.

Insured group health plan: A benefit plan in which the employer employs a health insurance issuer to assume the risk of providing health insurance.

Plan participants and beneficiaries: Individuals who are covered by a group health plan.

Self-insured group health plan: A benefit plan in which the employer assumes the risk of providing health insurance.

Self-insured church plan: A self-insured group health plan established by a church or association of churches covering the church or association's employees, which is not subject to regulation under ERISA unless it has elected to opt in to ERISA's provisions.

TPA: A third-party administrator, which is an entity that processes insurance claims and provides administrative services for employers with self-insured group health plans.

Plaintiffs and Related Entities:

Little Sisters of the Poor:

Little Sisters of the Poor: A religious non-profit organization that provides health care to employees through the Christian Brothers Employee Benefit Trust.

Christian Brothers Employee Benefit Trust: A self-insured church plan that is not subject to ERISA and uses Christian Brothers Services as its TPA.

Christian Brothers Services: The TPA for the Christian Brothers Employee Benefit Trust.

Southern Nazarene:

Southern Nazarene University: A religious non-profit organization that is self-insured up to $100,000 and provides health care to employees through Blue Cross Blue Shield for claims above $100,000.

Oklahoma Baptist University: A religious non-profit organization insured by Blue Cross Blue Shield of Oklahoma.

Oklahoma Wesleyan University: A religious non-profit organization insured by Community Care of Oklahoma.

Mid-America Christian University: A religious non-profit organization that provides health care to employees through plans provided by GuideStone Financial Resources.

Reaching Souls:

Reaching Souls: A religious non-profit organization that provides health care to employees through the GuideStone Plan.

Truett-McConnell College: A religious non-profit organization that provides health care to employees through the GuideStone Plan.

GuideStone Financial Resources: A religious non-profit organization that sponsors the GuideStone Plan and has arranged for TPAs to provide claims administration under that plan.

GuideStone Plan: A self-insured church plan that is not subject to ERISA and uses entities like Connecticut General Life Insurance Company, Highmark Health Services, and Express Scripts, Inc. as its TPAs.

I. INTRODUCTION

When Congress passed the Affordable Care Act ("ACA") in 2010, it built upon the widespread use of employer-based health insurance in the United States.[1] The ACA and its implementing regulations require employers who provide health insurance coverage to their employees to include coverage for certain types of preventive care without cost to the insured. The appeals before us concern the regulations that require group health plans to cover contraceptive services for women as a form of

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[1] A majority of the nonelderly population in the United States receives health insurance as a job benefit through an employer. *See* Melissa Majerol, Vann Newkirk & Rachel Garfield, *The Uninsured: A Primer – Key Facts About Health Insurance and the Uninsured in America*, The Kaiser Commission on Medicaid and the Uninsured, 1 (Jan. 2015), http://files.kff.org/attachment /the-uninsured-a-primer-key-facts-about-health-insurance-and-the-uninsured-in-america-primer.

preventive care ("Mandate").[2]

In response to religious concerns, the Departments implementing the ACA— Health and Human Services ("HHS"), Labor, and Treasury—adopted a regulation that exempts religious employers—churches and their integrated auxiliaries—from covering contraceptives. When religious non-profit organizations complained about their omission from this exemption, the Departments adopted a regulation that allows them to opt out of providing, paying for, or facilitating contraceptive coverage.[3] Under this regulation, a religious non-profit organization can opt out by delivering a form to their group health plan's health insurance issuer or third-party administrator ("TPA") or by sending a notification to HHS.

The Plaintiffs in the cases before us are religious non-profit organizations. They contend that

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[2] We use "Mandate" as shorthand for the ACA's employer mandate, which requires employers who offer health benefits to comply with the coverage requirements detailed in the ACA and its implementing regulations. This Mandate is distinct from the individual mandate at issue in National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566 (2012), which generally requires individuals to maintain health insurance.

[3] Plaintiffs object to the term "opt out" because their accommodation from the Mandate involves an act on their part—self-certification—that they deem objectionable. We believe "opt out" is accurate. Self-certifying for the accommodation expressly relieves Plaintiffs of their obligation to provide, pay for, or facilitate contraceptive coverage, and does so without substantially burdening their religious exercise. Under these conditions, the self-certification is accurately characterized as an "opt out." By definition, all opt-out mechanisms require some affirmative act by objecting parties.

complying with the Mandate or the accommodation scheme imposes a substantial burden on their religious exercise. The Plaintiffs argue the Mandate and the accommodation scheme violate the Religious Freedom Restoration Act ("RFRA") and the Religion and Speech Clauses of the First Amendment.[4]

Although we recognize and respect the sincerity of Plaintiffs' beliefs and arguments, we conclude the accommodation scheme relieves Plaintiffs of their obligations under the Mandate and does not substantially burden their religious exercise under RFRA or infringe upon their First Amendment rights. Exercising jurisdiction under 28 U.S.C. § 1292(a), we affirm the district court's denial of a preliminary injunction to the plaintiffs in *Little Sisters of the Poor Home for the Aged v. Sebelius*, 6 F. Supp. 3d 1225 (D. Colo. 2013), and reverse the district courts' grants of a preliminary injunction to the plaintiffs in *Southern Nazarene University v. Sebelius*, No. CIV-13-1015-F, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013), and *Reaching Souls International, Inc. v. Burwell*, No. CIV-13-1092-D, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013).

II. *HOBBY LOBBY* AND THIS CASE

Last year, the Supreme Court decided *Burwell v.*

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[4] RFRA applies to all subsequent federal statutes absent a specific exemption by Congress. *See* 42 U.S.C. § 2000bb-3(b) ("Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter."). The ACA, enacted in 2010, did not contain a specific exemption and is subject to RFRA. *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1157 (10th Cir. 2013).

Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014), in which closely-held for-profit corporations challenged the Mandate under RFRA. The difference between *Hobby Lobby* and this case is significant and frames the issue here. In *Hobby Lobby*, the plaintiff for-profit corporations objected on religious grounds to providing contraceptive coverage and could choose only between (1) complying with the ACA by providing the coverage or (2) not complying and paying significant penalties. *Id.* at 2759-60. In the cases before us, the plaintiff religious non- profit organizations can avail themselves of an accommodation that allows them to opt out of providing contraceptive coverage without penalty. Plaintiffs contend the process to opt out substantially burdens their religious exercise.

In other words, unlike in *Hobby Lobby*, the Plaintiffs do not challenge the general obligation under the ACA to provide contraceptive coverage. They instead challenge the process they must follow to get out of complying with that obligation. The Plaintiffs do not claim the Departments have not tried to accommodate their religious concerns. They claim the Departments' attempt is inadequate because the acts required to opt out of the Mandate substantially burden their religious exercise. As we discuss more fully below, however, the accommodation relieves Plaintiffs of their obligation to provide, pay for, or facilitate contraceptive coverage, and does so without substantially burdening their religious exercise.

III. BACKGROUND

We begin by providing background information on the ACA and its implementing regulations, the

Plaintiffs objecting to the accommodation scheme, and the procedural history of the three cases before us.

A. Regulatory Background

The regulations at issue in these cases have evolved in significant ways since their initial promulgation. We review: (1) the exemption from the ACA's contraceptive coverage requirement for churches and integrated auxiliaries, (2) the accommodation scheme for religious non-profit organizations, and (3) the mechanics of the accommodation scheme for different types of group health plans.

1. The ACA Mandate and the Religious Employer Exemption

Under the ACA, employer-sponsored group health plans must meet minimum coverage requirements. As part of these requirements, both group health plans and health insurance issuers must cover preventive health care services and cannot require plan participants and beneficiaries to share the costs of these services through co-payments, deductibles, or co-insurance. 42 U.S.C. § 300gg-13. On July 19, 2010, the Departments issued interim final rules implementing the ACA's requirements for preventive services. Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41,726 (July 19, 2010).

Among the services required by the ACA are preventive care and screenings for women "as provided for in comprehensive guidelines supported

by the Health Resources and Services Administration" ("HRSA"), a federal agency within HHS. 42 U.S.C. § 300gg-13(a)(4). On August 1, 2011, after receiving recommendations from the Institute of Medicine ("IOM"), the HRSA issued its guidelines for women's preventive health services. The guidelines include coverage of "[a]ll Food and Drug Administration [("FDA")] approved contraceptives, sterilization procedures, and patient education and counseling for all women with reproductive capacity," as prescribed by a health care provider. HRSA, Women's Preventive Services Guidelines, http://www.hrsa.gov/womensguidelines (last visited Mar. 25, 2015).

In accordance with the HRSA's guidelines, the Departments require coverage of the full range of FDA-approved contraceptive services. *See* 26 C.F.R. § 54.9815- 2713(a)(1)(iv); 29 C.F.R. § 2590.715-2713(a)(1)(iv); 45 C.F.R. § 147.130(a)(1)(iv). Not all employers, however, are required to comply with the Mandate.

First, employers with 50 or fewer employees are exempt from the Mandate because they are not required to offer insurance under the ACA. *See* 26 U.S.C. §§ 4980H(c)(2)(A), 4980D(d).

Second, "grandfathered" plans are exempt from the Mandate because the ACA allows individuals to temporarily maintain the health coverage they possessed before the ACA was enacted. *See* 42 U.S.C. § 18011.[5]

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[5] The exception for grandfathered plans is temporary and transitional. A health plan loses its grandfathered status—and

Third, and the most relevant here, is the exemption for religious employers. In response to concerns from religious organizations, the Departments amended the interim final regulations to give the HRSA authority to exempt group health plans established or maintained by religious employers. *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). The Departments defined a "religious employer" as one that: "(1) Has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a nonprofit organization described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code." *Id.* The cited sections "refer to churches, their integrated auxiliaries, and conventions or associations of churches, as well as the exclusively religious activities of any religious order." *Id.* The Departments noted the definition was intended "to reasonably balance the extension of any coverage of contraceptive services under the HRSA

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is subject to the Mandate—when it eliminates benefits, increases cost sharing requirements, or changes the terms of employer contributions. *See* 45 C.F.R. § 147.140(g). In 2011, 56 percent of individuals who receive health care from their employer were covered by grandfathered plans; in 2014, only 26 percent were covered by grandfathered plans. *See* Kaiser Family Foundation & Health Research & Educational Trust, *Employer Health Benefits: 2014 Annual Survey*, 7 (2014), http://files.kff.org/attachment/2014-employer-health-benefits-survey-full-report.

Guidelines to as many women as possible, while respecting the unique relationship between certain religious employers and their employees in certain religious positions." *Id.*[6] They invited comments on the proposed definition of "religious employer" and potential alternatives. *Id.*

The Departments received more than 200,000 responses to their request for comments from a variety of entities both supporting and opposing expansion of the proposed exemption. *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012). After reviewing these comments, they published final regulations on February 15, 2012, adopting their proposed definition of "religious employer." *Id.* at 8727. They also created a one-year safe harbor for religious non-profit organizations, during which the Departments would not enforce the Mandate against them. *Id.* at 8728.

2. The Accommodation Scheme for Religious Non-Profit Organizations

In response to religious groups that were dissatisfied with the scope of the proposed religious employer exemption, the Departments issued an advance notice of proposed rulemaking ("ANPRM") in anticipation of creating additional accommodations

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[6] A number of states have laws that require employers to cover contraceptive services but excuse some religious employers from complying. The Departments developed their definition to accord with these existing state laws. *See* 76 Fed. Reg. at 46,623.

for non-exempt religious non-profit organizations. Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501 (Mar. 21, 2012). After reviewing the comments received from the ANPRM, the Departments published proposed rules creating an accommodation for a wider range of religious non-profit organizations. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456 (Feb. 6, 2013).

The Departments received over 400,000 comments on the proposed rules, and finalized two notable changes. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,871 (July 2, 2013). First, the Departments simplified and clarified the existing exemption for religious employers by eliminating the first three elements of the definition, thereby defining "religious employer" as "an employer that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code ["IRC"]." *Id.* at 39,874. Second, they created an accommodation for religious non-profit organizations that did not meet this simplified definition of a religious employer. *Id.*

The regulations state a religious non-profit organization can receive this accommodation if it: (1) has religious objections to "providing coverage for some or all of the contraceptive services required to be covered" under the Mandate, (2) "is organized and operates as a nonprofit entity," (3) "holds itself out as a religious organization," and (4) "self-certifies that it satisfies the first three criteria." *Id.* The accommodation is available for both (1) insured group health plans, under which an employer contracts with

a health insurance issuer to assume the risk of providing benefits to employees, and (2) self-insured group health plans, under which the employer itself assumes the risk of providing benefits to employees. *Id.* at 39,875-80.[7] As we explain below, religious non-profit organizations can self-certify their religious objection and receive the accommodation either by notifying their health insurance issuer or TPA or by notifying HHS directly.

a. EBSA Form 700

To self-certify under the accommodation scheme, the Departments initially required religious non-profit organizations to use the Employee Benefits Security Administration's ("EBSA") Form 700 ("Form").[8] Objecting organizations are relieved from complying with the Mandate by delivering the executed Form to their health insurance issuer or TPA. The Form notifies the health insurance issuer or TPA that the organization self-certifies as exempt from the Mandate because it has a religious objection to providing coverage for some or all contraceptive services to its employees, and identifies the relevant federal regulations under which the organization is permitted to opt out of that obligation. *See* Dep't of Labor, EBSA Form 700 (Aug. 2014), http://www.dol.gov/ebsa/preventiveserviceseligibleorg

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[7] Employers with self-insured group health plans typically employ a TPA to coordinate logistics and deliver benefits. Cong. Budget Office, *Key Issues in Analyzing Major Health Insurance Proposals*, 6 (Dec. 2008), http://www.cbo.gov/sites/default/files/12-18-keyissues.pdf.

[8] A copy of the Form appears at the end of this opinion.

anizationcertificationform.doc (citing 26 C.F.R. § 54.9815-2713A(a); 29 C.F.R. § 2590.715-2713A(a); 45 C.F.R. § 147.131(b)).

The back of the Form notifies TPAs of their obligations.[9] Form at 2. It informs the TPA that the eligible organization "[w]ill not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services." Form at 2. It identifies regulations requiring the TPA to provide contraceptive coverage without cost sharing to plan participants and beneficiaries if the TPA agrees to continue providing administrative services for a group health plan. *Id.* (citing 26 C.F.R. § 54.9815-2713A; 29 C.F.R. § 2510.3-16; 29 C.F.R. § 2590.715-2713A). A TPA that receives the Form from an objecting employer is eligible for a government payment to cover the costs of providing contraceptive coverage. *See* 45 C.F.R. § 156.50(d)(5).

As part of this scheme, the regulations initially included a non-interference provision, which specified that objecting religious non-profit organizations "must not, directly or indirectly, seek to influence the third party administrator's decision" whether to provide coverage for contraceptives. 26 C.F.R. § 54.9815-2713A(b)(iii) (2013). When the Plaintiffs filed their suits, they sought a preliminary injunction relieving them from complying with this version of the accommodation scheme, arguing delivery of the Form

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[9] The notice of regulatory requirements on the back of the Form is specifically addressed to TPAs. *See* Form at 2. The legal obligations of health insurance issuers are evident from the text of the ACA itself. *See* 42 U.S.C. § 300gg-13.

to their health insurance issuer or TPA constituted a substantial burden on their religious exercise in violation of RFRA and the First Amendment.

b. Alternative notice

In response to litigation by Plaintiffs and others, the Departments have since expanded the accommodation scheme.[10] The Supreme Court granted injunctions pending appeal in two suits brought by religious non-profit organizations, including the Little Sisters, that objected to the accommodation scheme. *See Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014); *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Sebelius*, 134 S. Ct. 1022 (2014). In a third suit, the Court declined to recall or stay a circuit court mandate in favor of the Government, but granted an injunction to religious non-profit organizations pending final disposition of their petition for certiorari. *See Zubik v. Burwell*, Nos. 14A1065, 14-1418, 2015 WL 3947586, at *1 (U.S. June 29, 2015). The injunctions allowed the organizations to notify HHS directly of their religious objection to the Mandate rather than sending the Form to their health insurance issuers or TPAs. In response to the injunction in *Wheaton College*, the Departments issued an interim final rule on August 27, 2014, creating an alternative accommodation for religious non-profit organizations. Coverage of Certain

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[10] As we explain in this section, the Departments did not expand the pool of actors who could claim an accommodation and obtain relief from the Mandate. They expanded the accommodation scheme by offering objecting organizations an alternative method of self-certification.

Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,092, 51,092 (Aug. 27, 2014).[11]

These regulations relieve a religious non-profit organization from complying with the Mandate if it notifies HHS in writing of its religious objection to the provision of some or all contraceptive services. *Id.* at 51,094. The notice may be sent by letter or email, and must contain (1) "the name of the eligible organization and the basis on which it qualifies for an accommodation," (2) "its objection based on sincerely held religious beliefs to providing coverage of some or all contraceptive services," including any particular subset to which it objects; (3) the name and type of the group health plan; and (4) the name and contact information for any of the plan's TPAs and/or health

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[11] We discuss the procedural history of the cases before us below, but note that this alternative accommodation is akin to the accommodation granted by the Supreme Court in the cases mentioned above—*Little Sisters*, 134 S. Ct. 1022; *Wheaton College*, 134 S. Ct. 2806; and *Zubik*, 2015 WL 3947586:

> If the applicant informs the Secretary of Health and Human Services in writing that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services, the respondents are enjoined from enforcing against the applicant the challenged provisions of the Patient Protection and Affordable Care Act and related regulations pending final disposition of appellate review. To meet the condition for injunction pending appeal, the applicant need not use the form prescribed by the Government, EBSA Form 700, and need not send copies to health insurance issuers or third-party administrators.

Wheaton Coll., 134 S. Ct. at 2807.

insurance issuers. *Id.* at 51,094-95. According to the Departments, these requirements constitute "the minimum information necessary for the Departments to determine which entities are covered by the accommodation, to administer the accommodation, and to implement the policies in the July 2013 final regulations." *Id.* at 51,095.

The revised regulations also repeal the non-interference provision by deleting language prohibiting organizations from interfering with or seeking to influence their TPA's decision to cover contraception. *Id.*[12]

We note again that the entirety of this accommodation scheme for religious non- profit organizations—using either the Form or the alternative notice to HHS—was not available to the for-profit corporate plaintiff in *Hobby Lobby*. Here, an accommodation is available to Plaintiffs. In the cases before us, we consider whether their taking advantage

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[12] The regulations explain the rationale for this change:

> The Departments interpret the July 2013 final regulations solely as prohibiting the use of bribery, threats, or other forms of economic coercion in an attempt to prevent a third party administrator from fulfilling its independent legal obligations to provide or arrange separate payments for contraceptive services. Because such conduct is generally unlawful and is prohibited under other state and federal laws, and to reduce unnecessary confusion, these interim final regulations delete the language prohibiting an eligible organization from interfering with or seeking to influence a third party administrator's decision or efforts to provide separate payments for contraceptive services.

79 Fed. Reg. at 51,095.

of that accommodation to opt out of the Mandate is itself a substantial burden on their religious exercise.

3. The Mechanics of the Accommodation for Insured Plans, Self-Insured Plans, and Self-Insured Church Plans

The Plaintiffs use different types of employer-sponsored group health plans, which the Departments treat differently within the accommodation scheme. By its own terms, the ACA obligates both group health plans and health insurance issuers to provide contraceptive coverage. 42 U.S.C. § 300gg-13 ("A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for . . . with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph."); 26 C.F.R. § 54.9815- 2713(a)(1); 29 C.F.R. § 2590.715-2713(a)(1); 45 C.F.R. § 147.130(a)(1). Because the differences among these arrangements are relevant to our discussion of the merits of Plaintiffs' claims, we consider it helpful to explain how the Mandate and accommodation scheme affect insured plans, self-insured plans, and self-insured church plans.

a. *Insured plans*

When a religious non-profit organization offers its employees an insured plan, the statutory language not only requires the group health plan to cover contraception, but also obligates the plan's health

insurance issuer to ensure plan participants and beneficiaries receive contraceptive coverage. *See* 42 U.S.C. §§ 300gg-13; 300gg-22. Thus, even if a religious non-profit organization does not self-certify that it has an objection, its health insurance issuer is obligated to provide contraceptive coverage to plan participants and beneficiaries and charge the organization for the cost. *See Priests for Life v. U.S. Dep't of Health & Hum. Servs.*, 7 F. Supp. 3d 88, 95-96 & n.2 (D.D.C. 2013). The organization can free itself from complying with the Mandate and paying for that coverage, however, "if the eligible organization or group health plan provides either a copy of the self- certification to each issuer providing coverage in connection with the plan or a notice to the Secretary of Health and Human Services." 26 C.F.R. § 54.9815-2713AT(c)(1); 29 C.F.R. § 2590.715-2713A(c)(1); 45 C.F.R. § 147.131(c)(1). When an organization submits the Form expressing an objection to providing contraceptive coverage, "the issuer has sole responsibility for providing such coverage in accordance with § 147.130." 45 C.F.R. § 147.131(c)(1)(i); *see also* 26 C.F.R. § 54.9815-2713AT(c)(1)(i) (requiring coverage in accordance with § 54.9815-2713); 29 C.F.R. § 2590.715-2713A(c)(1)(i) (requiring coverage in accordance with § 2590.715-2713). Similarly, when an organization notifies HHS, the Department of Labor will send a separate notification to the organization's issuer informing it of that notice and describing its regulatory obligations. 45 C.F.R. § 147.131(c)(1)(ii); *see also* 26 C.F.R. § 54.9815- 2713AT(c)(1)(ii); 29 C.F.R. § 2590.715-2713A(c)(1)(ii).

In the context of insured plans, health insurance issuers are generally responsible for paying for

contraceptive coverage when a religious non-profit organization opts out. *See* 45 C.F.R. § 156.50. The Departments expect this will be cost-neutral for issuers because of the cost savings that accompany improvements in women's health and lower pregnancy rates. *See* 78 Fed. Reg. at 39,877.

b. Self-insured plans

When a religious non-profit organization offers its employees a self-insured plan, the accommodation works in a slightly different fashion. A self-insured group health plan complies with the regulatory requirements and is excused from providing contraceptive coverage if "[t]he eligible organization or its plan contracts with one or more third party administrators" and "[t]he eligible organization provides either a copy of the self-certification to each third party administrator or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage of all or a subset of contraceptive services." 26 C.F.R. § 54.9815- 2713AT(b)(1); 29 C.F.R. § 2590.715-2713A(b)(1).

Although the text of the ACA does not specify a role for TPAs, it expressly requires group health plans to include contraceptive coverage, and federal regulations impose obligations on TPAs that administer self-insured group health plans. *See* 42 U.S.C. § 300gg-13; 26 C.F.R. § 54.9815-2713AT(b); 29 C.F.R. § 2590.715-2713A(b). The regulations require a TPA administering a group health plan to provide or arrange for contraceptive coverage without cost sharing with the organization or its beneficiaries when it: (1) receives a notification that an eligible

employer has opted out of providing coverage and (2) decides to remain in a relationship with that employer or its plan to provide administrative services for the plan. 26 C.F.R. § 54.9815-2713AT(b)(2); 29 C.F.R. § 2590.715-2713A(b)(2). The TPA's obligations are enforceable under the Employee Retirement Income Security Act ("ERISA"). *See* 78 Fed. Reg. at 39,879-80.

In the context of self-insured plans, a TPA may seek reimbursement if it has received the Form or a notification from the government and "provides or arranges payments for contraceptive services." *See* 26 C.F.R. § 54.9815-2713AT(b)(3); 29 C.F.R. § 2590.715-2713A(b)(3); 45 C.F.R. § 156.50(d)(2)(ii)-(iii). TPAs do so by working through health insurance issuers, who receive adjustments to fees they pay to the government under the ACA and pass along the reimbursements to TPAs. *See* 45 C.F.R. § 156.50(d).

c. Self-insured church plans

Although federal regulations impose certain requirements on TPAs, the Departments concede they lack authority to enforce those requirements as to self-insured "church plans," which are group health plans established by a church or association of churches covering the church's or association's employees. 29 U.S.C. § 1002(33). Organizations that provide health care coverage for employees through self-insured church plans are exempt from regulation under ERISA. 29 U.S.C. § 1003(b)(2). Unless a church plan has made an election under 26 U.S.C. § 410(d), which opts plans into provisions of ERISA, the Departments concede they lack authority to compel church plan TPAs to provide contraceptive coverage, and may not levy fines against those TPAs for failing to provide it.

d. Legal obligation to provide coverage after the accommodation

Although the accommodation is available for both insured and self-insured group health plans, the source of the legal obligation to provide contraceptive coverage after a religious non-profit organization has opted out differs based on the type of insurance arrangement the organization uses. When an organization takes advantage of the accommodation, the ACA requires health insurance issuers to provide coverage for insured group health plans, while federal regulations adopted pursuant to the ACA require TPAs to arrange coverage for self-insured group plans that are subject to ERISA. As we discuss below, these distinctions shape the claims advanced by different Plaintiffs in the cases before us.

B. The Plaintiffs

The Plaintiffs[13] in this litigation object to both means to receive an accommodation—sending the Form to their health insurance issuer or TPA or sending a notification to HHS. The Plaintiffs differ from each other in ways that are relevant to the Departments' authority to require employers to provide contraceptive coverage and relieve objecting religious non-profit organizations from the Mandate when they use the accommodation scheme.

1. *Little Sisters of the Poor*

The Little Sisters of the Poor Home for the Aged,

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[13] When we refer to the plaintiffs in all three cases collectively, we use "Plaintiffs." When we refer to a subset of the plaintiffs, we use "plaintiffs."

Denver, Colorado and Little Sisters of the Poor, Baltimore ("Little Sisters") belong to an order of Catholic nuns who devote their lives to care for the elderly. The Little Sisters provide health insurance coverage to their employees through the Christian Brothers Employee Benefit Trust ("Trust"), a self-insured church plan that is not subject to ERISA. The Trust uses Christian Brothers Services ("Christian Brothers"), another Catholic organization, as its TPA.

The Little Sisters have always excluded coverage of sterilization, contraception, and abortifacients from their health care plan in accordance with their religious belief that deliberately avoiding reproduction through medical means is immoral. The Little Sisters "believe that it is wrong for them to intentionally facilitate the provision of these medical procedures, drugs, devices, and related counseling and services." LS Br. at 10. They cite "well-established Catholic teaching that prohibits encouraging, supporting, or partnering with others in the provision of sterilization, contraception, and abortion." LS Br. at 9-10. The Little Sisters contend they "cannot provide these things, take actions that directly cause others to provide them, or otherwise appear to participate in the government's delivery scheme," as the mere appearance of condoning these services "would violate their public witness to the sanctity of human life and human dignity and could mislead other Catholics and the public." LS Br. at 10.

The Little Sisters are subject to the Mandate unless they take advantage of the accommodation scheme by delivering the Form to the Christian Brothers, their TPA, or notifying HHS of their religious objection. If they do not take one of these

steps and do not provide contraceptive coverage, they estimate a single Little Sisters home could incur penalties of up to $2.5 million per year, and allege the Trust could lose up to $130 million in plan contributions. The *Little Sisters* plaintiffs object that the accommodation scheme violates their sincerely held religious beliefs because they cannot take actions that directly cause others to provide contraception or appear to participate in the Departments' delivery scheme.

2. *Southern Nazarene*

Southern Nazarene University, Oklahoma Wesleyan University, Oklahoma Baptist University, and Mid-America Christian University are "Christ-centered institutions of higher learning." SN Br. at 1-2. Southern Nazarene is partially self-insured; it generally assumes the risks of providing coverage but contracts with a health insurance issuer to pay all claims over $100,000. For its insured employee coverage, it uses Blue Cross Blue Shield of Oklahoma. It offers separate coverage to students through an insured plan. Oklahoma Baptist is an insured university. It uses Blue Cross Blue Shield of Oklahoma, and offers separate coverage to students through an insured plan. Oklahoma Wesleyan is an insured university. It uses Community Care of Oklahoma. Mid-America Christian is a self-insured university on a church plan that is not subject to ERISA. It uses plans provided by GuideStone Financial Resources.[14]

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[14] The descriptions of Mid-America Christian's insurance arrangements in the record before us are inconsistent. Before the

The universities have brought suit collectively, but they are in slightly different positions insofar as Mid-America Christian University uses a church plan and contracts with a TPA, Oklahoma Baptist University and Oklahoma Wesleyan use health insurance issuers, and Southern Nazarene contracts with a TPA but uses a health insurance issuer for student coverage and employee claims above $100,000.

The universities believe "it would be sinful and immoral for them to participate in, pay for, facilitate, enable, or otherwise support access to abortion, abortion-inducing drugs and devices, and related counseling." SN Br. at 1-2. They object to the provision of contraceptives they consider abortifacients. The universities currently offer health plans to students

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district court, counsel described Mid- America Christian's plan as "insured by GuideStone," App. in SN at A32, and suggested it would be obligated, like Oklahoma Baptist and Oklahoma Wesleyan, to deliver the Form to its health insurance issuer to opt out of the Mandate. In its opening brief on appeal, counsel described Mid-America Christian's plan as "self-insured," and suggested it would be obligated, like Southern Nazarene, to deliver the Form to its TPA. SN Br. at 2, 18. In a supplemental brief and at oral argument, counsel now indicates Mid-America Christian has a self-insured church plan and is more akin to the *Reaching Souls* plaintiffs. SN Supp. Br. II at 9 n.2; Oral Arg. in SN at 20:24-20:32.

We treat Mid-America Christian's plan as a self-insured church plan. The parties in *Southern Nazarene* stipulated as fact that Mid-America Christian's group health plan is provided by GuideStone Financial Resources. *Southern Nazarene*, 2013 WL 6804265, at *2. Because we understand GuideStone Financial Resources to be a sponsor of self- insured church plans and not an insurer, we assume the latest characterization on appeal is correct and treat Mid-America Christian's group health plan as a self-insured church plan that is not subject to ERISA.

and employees that do not cover the contraceptives the universities find objectionable.

The universities are subject to the Mandate, but they may take advantage of the accommodation scheme by delivering the Form or notifying HHS of their religious objections to relieve themselves of the obligation to provide contraceptive coverage. They object to the accommodation, however, because they believe it requires them to expressly or functionally offer contraceptive coverage through their group health plan, interferes with the spiritual development of their communities, and requires them to facilitate behavior they consider sinful. If they do not take advantage of the accommodation, each university must either provide coverage or incur penalties of $100 per employee per day.

3. ***Reaching Souls***

Reaching Souls is a non-profit corporation founded by a Southern Baptist minister and based in Oklahoma. The organization trains pastors and evangelists and provides care to orphans in Africa, India, and Cuba. Truett-McConnell College is a private liberal arts college based in Georgia. Both Reaching Souls and Truett-McConnell use the GuideStone Plan, a self-insured church plan that is not subject to ERISA. GuideStone Financial Resources, a Texas non-profit corporation, established the GuideStone Plan and holds the assets funding it in trust. GuideStone Financial Resources has entered into agreements with other entities to provide claims administration as TPAs under the GuideStone Plan, including Connecticut General Life Insurance Company, Highmark Health Services, and Express

Scripts, Inc.

Reaching Souls believes life begins at conception and objects to four of the twenty FDA-approved methods of contraception that Reaching Souls characterizes as abortifacients. Truett-McConnell has adopted the Southern Baptist Convention's statement of faith and objects to the same four methods of contraception. GuideStone Financial Resources, as an arm of the Southern Baptist Convention, also opposes coverage of contraception methods it believes to be abortifacients. The organizations ground their beliefs in the sanctity of human life and opposition to elective abortion in the religious teachings of the Southern Baptist Convention.

Both Reaching Souls and Truett-McConnell College are subject to the Mandate, but they may take advantage of the accommodation scheme by delivering the Form or notifying HHS of their religious objections. If they do, GuideStone Financial Resources would have to pass the information to the TPAs of the GuideStone Plan to effectuate the coverage. The plaintiffs believe this would violate their religious beliefs "by making them complicit in the government's scheme to provide abortifacients." RS Br. at 4. If the organizations do not take advantage of the accommodation scheme or provide coverage, they contend they will incu millions of dollars in fines, which "would crush the ministries and force a mass exodus from GuideStone." RS Br. at 3.

C. Procedural History

The district courts reached different results in the three cases before us, denying a preliminary

injunction to the plaintiffs in *Little Sisters* but granting a preliminary injunction to the plaintiffs in *Southern Nazarene* and *Reaching Souls*. Reviewing the reasoning behind their determinations clarifies the claims before us on appeal.

1. *Little Sisters of the Poor*

In *Little Sisters*, the district court determined that complying with the accommodation scheme would not impose a substantial burden on the Little Sisters' or Christian Brothers' religious exercise. 6 F. Supp. 3d at 1239-45. The court's analysis of the preliminary injunction factors began and ended by examining whether the plaintiffs would suffer irreparable injury if the requested relief were denied. *Id.* at 1236. After determining it was the court's duty to determine how the regulations operate as a matter of law, *id.* at 1239, the court concluded the accommodation scheme does not require the Little Sisters to provide contraceptive coverage or to participate in the provision of contraceptive coverage, *id.* at 1239-42.

The court noted that the Little Sisters—unlike the plaintiffs in *Hobby Lobby*— could be relieved of the obligation to provide coverage by signing and delivering the Form to their TPA, the Christian Brothers. *Id.* at 1237.[15] The court underscored that,

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[15] At the time the district courts decided all three of the cases before us, the interim final rules allowing Plaintiffs to opt out by notifying HHS of their religious objection had not yet been issued. The district court decisions therefore focus on the Form and do not consider the expanded accommodation scheme in August 2014's interim final rules. In supplemental briefing to this court, the Plaintiffs argue the expanded scheme does not adequately address the religious liberty concerns they have

while the Departments could require the Little Sisters to sign and deliver the Form to their TPA to avoid the Mandate, the Departments lacked enforcement authority under ERISA to levy fines or otherwise force the Christian Brothers to provide contraceptive coverage as the TPA for a self-insured, ERISA-exempt church plan. *Id.* at 1243-44. The court concluded that requiring the Little Sisters to sign and deliver the Form to opt out did not constitute a substantial burden on their religious exercise and declined to issue a preliminary injunction. *Id.* at 1242-45.

The Little Sisters next asked the Tenth Circuit for an injunction pending appeal, which this court denied. The Supreme Court subsequently granted their request for an injunction pending appeal, allowing the Little Sisters to notify HHS of their religious objection instead of sending the Form to their TPA as the regulations at the time required. *See Little Sisters*, 134 S. Ct. 1022. The Little Sisters now appeal the district court's denial of a preliminary injunction.

2. *Southern Nazarene*

In *Southern Nazarene*, the district court granted a preliminary injunction to the plaintiffs. 2013 WL 6804265, at *11. The court's analysis focused mainly on the plaintiffs' likelihood of success on the merits.[16]

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raised in this litigation.

[16]The district court noted that, unlike in the recently decided *Priests for Life*, 7 F. Supp. 3d 88, the parties in *Southern Nazarene* "stipulated that the *act of signing the certification* is contrary to the religious beliefs to which these institutions subscribe." *Southern Nazarene*, 2013 WL 6804265, at *8. The court's characterization paraphrases the stipulation, which

Id. at *7-10. The court characterized the Form as "in effect, a permission slip which must be signed by the institution to enable the plan beneficiary to get access, free of charge, from the institution's insurer or third party administrator, to the products to which the institution objects." *Id.* at *8. It determined the Form imposed a substantial burden on the plaintiffs' sincere religious exercise and the Government had not articulated a compelling state interest or argued its approach was the least restrictive means of advancing that interest. *Id.* at *7-10.

The court concluded the plaintiffs had shown they were likely to succeed on the merits. *Id.* After reaching this conclusion, it briefly reviewed the other preliminary injunction factors and entered a preliminary injunction that prevented the Departments from enforcing the Mandate, requiring self-certification to opt out, or levying penalties. *Id.* at *10-11. The Government now appeals the district court's ruling.

3. *Reaching Souls*

Like the district court in *Southern Nazarene*, the district court in *Reaching Souls* granted a preliminary

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addresses only the litigation position taken by the *Southern Nazarene* plaintiffs. The parties specifically stipulated: "The Universities believe that, within the operation of the regulations, completing and delivering the self-certification to their issuers or third party administrators would violate the Universities' sincere religious beliefs." *Id.* at *5. The Government accepts that the *Southern Nazarene* plaintiffs take the position that completing the self-certification would violate their religious beliefs—a fairly straightforward characterization of their litigation position—but has never conceded that completing the self-certification actually would violate their religious beliefs.

injunction to the plaintiffs. 2013 WL 6804259, at *8. The court primarily analyzed the likelihood of plaintiffs' success on the merits. *Id.* at *6-8. It characterized the Government's substantial burden argument as "simply another variation of a proposition rejected by the court of appeals in *Hobby Lobby*," likening it to the argument that the Mandate was not a substantial burden on for-profit employers because it required intervening acts by third parties—employees deciding whether to acquire contraception. *Id.* at *7. It emphasized that regardless of whether the Form actually triggers the provision of contraceptive services, the plaintiffs believe that signing it would signal their tacit support or cooperation. *Id.*

The court thus determined "the accommodation scheme applies substantial pressure on Plaintiffs to violate their belief that participating in or facilitating the accommodation is the moral equivalent of directly complying with the contraceptive mandate." *Id.* at *8. It briefly reviewed the other preliminary injunction factors and enjoined the Government from requiring the plaintiffs to comply with the Mandate and accommodation scheme or penalizing the plaintiffs for noncompliance. *Id.* The Government now appeals the district court's ruling.

IV. UNUSUAL NATURE OF PLAINTIFFS' CLAIM

Before we present our analysis of the issues, we wish to highlight the unusual nature of Plaintiffs' central claim, which attacks the Government's attempt to accommodate religious exercise by providing a means to opt out of compliance with a

generally applicable law.

Most religious liberty claimants allege that a generally applicable law or policy without a religious exception burdens religious exercise, and they ask courts to strike down the law or policy or excuse them from compliance. Our circuit's three most recent RFRA cases fall into this category. In *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc), *aff'd sub nom. Hobby Lobby*, 134 S. Ct. 2751, the ACA required the plaintiffs to provide their employees with health insurance coverage of contraceptives against their religious beliefs. In *Yellowbear v. Lampert*, 741 F.3d 48 (10th Cir. 2014), a prison policy denied the plaintiff access to a sweat lodge, where he wished to exercise his Native American religion. In *Abdulhaseeb v. Calbone*, 600 F.3d 1301 (10th Cir. 2010), a prison policy denied the plaintiff a halal diet, which is necessary to his Muslim religious exercise. In each instance, the law or policy failed to provide an exemption or accommodation to the plaintiff(s).

The Supreme Court's recent ruling in *Holt v. Hobbs*, 135 S. Ct. 853 (2015), which concerned a prison ban on inmates' growing beards, is another recent example of the more common RFRA claim. The plaintiff in *Holt* sought to grow a beard in accordance with his Muslim faith. In *Holt*, like in *Hobby Lobby*, the government defendants insisted on a complete restriction and did not attempt to accommodate the plaintiff's religious exercise. The plaintiff in *Holt* proposed a compromise—he would be allowed to grow only a half-inch beard—which the prison refused. 135 S. Ct. at 861. The Court ultimately approved this compromise in its ruling. *Id.* at 867.

In the cases before us, by contrast, the Departments have developed a religious accommodation rather than leaving it for the courts to fashion judicial relief. Plaintiffs not only challenge a law that requires them to provide contraceptive coverage against their religious beliefs, they challenge the exception that the law affords to them. The precedents Plaintiffs cite are instructive in some respects, but none of them involve a situation where the government offers religious objectors an accommodation.[17] The Supreme Court and this circuit have suggested such accommodations might have eliminated or lessened burdens we otherwise deemed substantial. *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2759 (observing the accommodation scheme "constitutes an alternative that achieves all of the Government's aims while providing greater respect for religious liberty"); *Yellowbear*, 741 F.3d at 56 (underscoring that the case "isn't a situation where the claimant is left with some degree of choice in the matter and we have to inquire

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[17] The accommodation adds an additional consideration that makes this unlike the typical RFRA case. In *Hobby Lobby*, *Yellowbear*, *Abdulhaseeb*, and *Holt*, the government either required or prohibited acts of religious significance to the plaintiffs. In the cases before us, the government has freed Plaintiffs from the responsibility to perform the act they consider religiously objectionable—namely, providing contraceptive coverage. Nonetheless, the Plaintiffs argue an act they do not consider objectionable in itself—completing a form or writing to HHS—becomes objectionable because it either causes the provision of contraceptive coverage or renders them complicit in the provision of contraceptive coverage. Therefore, unlike the aforementioned cases, we are in the slightly different position of considering whether an otherwise unobjectionable act, understood in context, constitutes a substantial burden on Plaintiffs' religious exercise.

into the degree of the government's coercive influence on that choice"). Until now, however, we have not squarely considered a RFRA challenge to a religious accommodation.

The closest Tenth Circuit case we have found is *United States v. Friday*, 525 F.3d 938 (10th Cir. 2008), in which defendant Winslow Friday argued his conviction for shooting a bald eagle without a permit violated RFRA because he shot the eagle for use in a tribal religious ceremony. The Bald and Golden Eagle Protection Act forbids killing a bald eagle, but an applicant can obtain a permit to "take" a live eagle for a religious ceremony. *See* 16 U.S.C. §§ 668, 668a. We recognized the potential question of "whether it substantially burdens Mr. Friday's religion to require him to obtain a permit in advance of taking an eagle." *Friday*, 525 F.3d at 947. We said we were "skeptical that the bare requirement of obtaining a permit can be regarded as a 'substantial burden' under RFRA," *id.*, but Mr. Friday did not make that specific argument, and we decided the permit accommodation otherwise met RFRA's strict scrutiny element, *id.* at 948.

We spoke favorably of the government's accommodation scheme in *Friday*, even though "[t]hat accommodation may be more burdensome than the [religious objectors] would prefer, and may sometimes subordinate their interests to other policies not of their choosing." *Id.* at 960. As we noted in conclusion: "Law accommodates religion; it cannot wholly exempt religion from the reach of the law." *Id.* We therefore turn to uncharted Tenth Circuit terrain.

* * * *

The Plaintiffs in the three cases before us assert claims against the Mandate and accommodation scheme under RFRA and the First Amendment's Free Exercise, Establishment, and Free Speech Clauses.[18] Because we determine the accommodation scheme relieves Plaintiffs from complying with the Mandate and does not substantially burden their religious exercise under RFRA or infringe upon their First Amendment rights, we affirm the district court's denial of a preliminary injunction to the plaintiffs in *Little Sisters* and reverse the district courts' grants of a preliminary injunction to the plaintiffs in *Southern Nazarene* and *Reaching Souls*.

V. RFRA

Under RFRA, the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless "it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1.

Plaintiffs argue the ACA and its implementing regulations violate RFRA because they substantially burden their religious exercise by forcing them to do one of three things: (a) comply with the Mandate and provide contraceptive coverage, (b) take advantage of the accommodation scheme, or (c) pay steep fines for

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[18] We refer to "Plaintiffs" throughout the discussion, but in the First Amendment context, "Plaintiffs" refers only to the plaintiffs in *Little Sisters* and *Reaching Souls*. *See infra* note 51.

non-compliance.[19] We conclude that the accommodation scheme relieves Plaintiffs of complying with the Mandate or paying fines and does not impose a substantial burden on Plaintiffs' religious exercise for the purposes of RFRA.

To explain why the accommodation is permissible under RFRA, we first review the RFRA framework and consider how religious accommodations may lessen or eliminate the substantiality of a burden on

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[19] The Government identifies a fourth option: by declining to sponsor a group health plan, Plaintiffs could avoid complying with the Mandate, using the accommodation, or paying the fines. The Government frames the Plaintiffs' provision of health insurance as an economic expenditure, and notes that regulations may make a business activity more expensive or onerous without violating the freedom of religion.

See Tony & Susan Alamo Found. v. Sec. of Labor, 471 U.S. 290, 303-05 (1985); *Braunfeld v. Brown*, 366 U.S. 599, 605-06 (1961); *but see Hobby Lobby*, 134 S. Ct. at 2777. Plaintiffs respond that they consider the provision of health insurance a religious obligation, not merely an economic expenditure. Plaintiffs "believe they have a religious obligation to care for the employees who join in their ministry, and they cannot throw those people off their insurance policies without violating that obligation and harming their ministry." LS Reply Br. at 8.

Because we determine the accommodation scheme is not a substantial burden, we need not decide whether this fourth option constitutes a substantial burden on religious exercise—or, if it does, whether it survives strict scrutiny.

For similar reasons, we need not address the safe harbor provision detailed in the June 2013 regulations, which indicates organizations with self-insured group health plans that bring administration of their plans in-house and thereby do not use third-party administrators currently are not subject to enforcement of the contraceptive coverage requirement. 78 Fed. Reg. at 39,880-81.

religious exercise. We then apply this framework to the accommodation scheme before us, which exempts religious non-profits from providing contraceptive coverage and instead assigns that task to health insurance issuers and TPAs.

We conclude the accommodation does not substantially burden Plaintiffs' religious exercise. The accommodation relieves Plaintiffs from complying with the Mandate and guarantees they will not have to provide, pay for, or facilitate contraceptive coverage. Plaintiffs do not "trigger" or otherwise cause contraceptive coverage because federal law, not the act of opting out, entitles plan participants and beneficiaries to coverage. Although Plaintiffs allege the administrative tasks required to opt out of the Mandate make them complicit in the overall delivery scheme, opting out instead relieves them from complicity. Furthermore, these *de minimis* administrative tasks do not substantially burden religious exercise for the purposes of RFRA.

The dissent parts ways with our majority opinion on the self-insured plaintiffs' RFRA claims. It stresses that, by opting out, the self-insured plaintiffs would cause the legal responsibility to provide contraceptive coverage to shift to their TPAs.[20] We agree. As we observe below, the regulations are clear on that

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[20] Plaintiffs make causation the centerpiece of their RFRA claim. They allege that opting out of the Mandate would cause or make them complicit in providing contraceptive coverage, and thus substantially burdens their religious exercise. Much of our opinion assesses and ultimately rejects the merits of this claim.

point.[21] But shifting legal responsibility to provide coverage away from the plaintiffs relieves rather than burdens their religious exercise. The ACA and its implementing regulations entitle plan participants and beneficiaries to coverage whether or not the plaintiffs opt out. And the government has established a scheme where, if the law is followed, self-insured plaintiffs that opt out are relieved of providing, paying for, and facilitating coverage; the government assigns that responsibility to their TPAs; and plan participants and beneficiaries receive the coverage to which they are entitled by federal law. Such an arrangement is among the common and permissible methods of religious accommodation in a pluralist society, and does not constitute a substantial burden under RFRA.

A. Legal Background

1. Standard of Review

Each appeal before us seeks review of a district court order granting or denying a preliminary injunction. We review orders granting or denying a preliminary injunction for abuse of discretion. *See Hobby Lobby*, 723 F.3d at 1128; *Aid for Women v. Foulston*, 441 F.3d 1101, 1115 (10th Cir. 2006).

A preliminary injunction may be granted if the party seeking it shows: "(1) a likelihood of success on the merits; (2) a likely threat of irreparable harm to the movant; (3) the harm alleged by the movant

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[21] Indeed, this is an unremarkable feature of the accommodation scheme. An opt out religious accommodation typically contemplates that a non-objector will replace the religious objector and take over any legal responsibilities.

outweighs any harm to the non-moving party; and (4) an injunction is in the public interest." *Hobby Lobby*, 723 F.3d at 1128. A district court abuses its discretion by granting or denying a preliminary injunction based on an error of law. *See id.*; *Aid for Women*, 441 F.3d at 1115.

2. RFRA and Free Exercise

RFRA was enacted in 1993 in response to *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), in which the Supreme Court held that burdens on religious exercise are constitutional under the Free Exercise Clause if they result from a neutral law of general application and have a rational basis. *Id.* at 878-80; *United States v. Hardman*, 297 F.3d 1116, 1126 (10th Cir. 2002). Congress enacted RFRA to restore the pre-*Smith* standard, which permitted legal burdens on an individual's religious exercise only if the government could show a compelling need to apply the law to that person and that the law did so in the least restrictive way. *Smith*, 494 U.S. at 882-84; *see also Hobby Lobby*, 134 S. Ct. at 2792-93 (Ginsburg, J., dissenting). Congress specified the purpose of RFRA was to restore this compelling interest test as it had been recognized in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *See* 42 U.S.C. § 2000bb(b)(1).

By restoring the pre-*Smith* compelling interest standard, Congress did not express any intent to alter other aspects of Free Exercise jurisprudence. *See id.*; *Hobby Lobby*, 723 F.3d at 1133 ("Congress, through RFRA, intended to bring Free Exercise jurisprudence back to the test established before *Smith*. There is no

indication Congress meant to alter any other aspect of pre-*Smith* jurisprudence . . . ."). Notably, pre-*Smith* jurisprudence allowed the government "wide latitude" to administer large administrative programs, and rejected the imposition of strict scrutiny in that context. As the Supreme Court indicated in *Bowen v. Roy*,

> In the enforcement of a facially neutral and uniformly applicable requirement for the administration of welfare programs reaching many millions of people, the Government is entitled to wide latitude. The Government should not be put to the strict test applied by the District Court; that standard required the Government to justify enforcement of the use of Social Security number requirement as the least restrictive means of accomplishing a compelling state interest.

476 U.S. 693, 707 (1986). As we discuss at greater length below, the pre-*Smith* standards restored by RFRA permitted the Government to impose *de minimis* administrative burdens on religious actors without running afoul of religious liberty guarantees.

3. Elements of RFRA Analysis

RFRA analysis follows a burden-shifting framework. "[A] plaintiff establishes a prima facie claim under RFRA by proving the following three elements: (1) a substantial burden imposed by the federal government on a (2) sincere (3) exercise of religion." *Kikumura v. Hurley*, 242 F.3d 950, 960 (10th

Cir. 2001); *see* 42 U.S.C. § 2000bb-1(a).[22] The burden then shifts to the government to demonstrate its law or policy advances "a compelling interest implemented through the least restrictive means available." *Hobby Lobby*, 723 F.3d at 1142-43. The government must show that the "compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Id.* at 1126 (quotations and citation omitted). "This burden-shifting approach applies even at the preliminary injunction stage." *Id.*

We have previously stated "a government act imposes a 'substantial burden' on religious exercise if it: (1) requires participation in an activity prohibited by a sincerely held religious belief, (2) prevents participation in conduct motivated by a sincerely held religious belief, or (3) places substantial pressure on an adherent to engage in conduct contrary to a sincerely held religious belief." *Hobby Lobby*, 723 F.3d at 1125-26 (quotations and alterations omitted); *see also Yellowbear*, 741 F.3d at 55 (applying this framework to RLUIPA); *Abdulhaseeb*, 600 F.3d at 1315 (same). As we discuss in the next section, whether a law substantially burdens religious exercise in one or more of these ways is a matter for

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[22] RFRA originally defined "exercise of religion" as "the exercise of religion under the First Amendment to the Constitution." In 1999, the Religious Land Use and Institutionalized Persons Act ("RLUIPA") amended RFRA, and redefined "exercise of religion" by reference to 42 U.S.C. § 2000cc-5(7)(A). 42 U.S.C. § 2000bb-2(4). Section 2000cc-5(7)(A) expanded the phrase to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A); *see Kikumura*, 242 F.3d at 960.

courts—not plaintiffs—to decide.

4. Courts Determine Substantial Burden

To determine whether plaintiffs have made a prima facie RFRA claim, courts do not question "whether the petitioner . . . correctly perceived the commands of [his or her] faith." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981); *see Hobby Lobby*, 723 F.3d at 1138-40. But courts do determine whether a challenged law or policy substantially burdens plaintiffs' religious exercise. RFRA's statutory text and religious liberty case law demonstrate that courts—not plaintiffs—must determine if a law or policy substantially burdens religious exercise.

RFRA states the federal government "shall not substantially burden a person's exercise of religion." 42 U.S.C. § 2000bb-1(a). We must "give effect . . . to every clause and word" of a statute when possible. *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). Drafts of RFRA prohibited the government from placing a "burden" on religious exercise. Congress added the word "substantially" before passage to clarify that only some burdens would violate the act. 139 Cong. Rec. S14352 (daily ed. Oct. 26, 1993) (statements of Sen. Kennedy and Sen. Hatch).

We therefore consider not only whether a law or policy burdens religious exercise, but whether that burden is substantial. If plaintiffs could assert and establish that a burden is "substantial" without any possibility of judicial scrutiny, the word "substantial" would become wholly devoid of independent meaning.

See Menasche, 348 U.S. at 538-39. Furthermore, accepting any burden alleged by Plaintiffs as "substantial" would improperly conflate the determination that a religious belief is sincerely held with the determination that a law or policy substantially burdens religious exercise.

Every circuit that has addressed a RFRA challenge to the accommodation scheme at issue here has concluded that whether the government has imposed a "substantial burden" is a legal determination. *See E. Tex. Baptist Univ. v. Burwell*, Nos. 14-20112, 14-10241, 14-40212, 14-10661, 2015 WL 3852811, at *3-5 & n.33 (5th Cir. June 22, 2015); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 612 (7th Cir. 2015); *Geneva Coll. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 436 (3d Cir. 2015); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 247-49 (D.C. Cir. 2014); *Mich. Catholic Conf. & Catholic Family Servs. v. Burwell*, 755 F.3d 372, 385 (6th Cir. 2014), *vacated and remanded*, 135 S. Ct. 1914 (2015). This is consistent with our determination that we review *de novo* "what constitutes [a] substantial burden . . . and the ultimate determination as to whether the RFRA has been violated." *United States v. Meyers*, 95 F.3d 1475, 1482 (10th Cir. 1996); *see also Yellowbear*, 741 F.3d at 56 (determining "a reasonable finder of fact could conclude the prison has substantially burdened Mr. Yellowbear's religious exercise"). Thus, we "accept[] as true the factual allegations that [Plaintiffs'] beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that [their] religious exercise is substantially burdened." *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008); *see Mahoney v. Doe*,

642 F.3d at 1112, 1121 (D.C. Cir. 2011); *Henderson v. Kennedy*, 253 F.3d 12, 17 (D.C. Cir. 2001).[23]

We have cautioned that substantiality does not permit us to scrutinize the "theological merit" of a plaintiff's religious beliefs—instead, we analyze "the intensity of the coercion applied by the government to act contrary to those beliefs." *Hobby Lobby*, 723 F.3d at 1137 (emphasis omitted). "Our only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief." *Id.*[24] In determining whether a law or policy applies substantial pressure on a claimant to violate his or her beliefs, we consider how the law or policy being challenged actually operates and affects

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[23] Plaintiffs cite *Thomas* to argue we must accept their belief that they cannot participate in the accommodation whether or not that belief is "acceptable, logical, consistent, or comprehensible." LS Br. at 47; RS Br. at 39 (quoting *Thomas*, 450 U.S. at 714). *Thomas* concerned the denial of unemployment benefits to a claimant who quit his job because his religious beliefs prohibited him from producing armaments to be used for war. *Thomas* prevents courts from scrutinizing the theological merit of a plaintiff's sincere religious belief, but not from assessing whether a challenged law or policy amounts to a substantial burden on religious exercise. *See Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds. We do, however, have doubts whether the alleged burden imposed by the deduction disallowance on the Scientologists' practices is a substantial one." (citing *Thomas*, 450 U.S. at 716)).

[24] The Government does not dispute the sincerity of Plaintiffs' religious beliefs. *See Little Sisters*, 6 F. Supp. 3d at 1237; *Southern Nazarene*, 2013 WL 6804265, at *5; *Reaching Souls*, 2013 WL 6804259, at *4.

religious exercise. *See Geneva Coll.*, 778 F.3d at 436 ("We may consider the nature of the action required of the appellees, the connection between that action and the appellees' beliefs, and the extent to which that action interferes with or otherwise affects the appellees' exercise of religion—all without delving into the appellees' beliefs."); *see also* 139 Cong. Rec. S14352 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy) (observing that RFRA would not impose strict scrutiny for "governmental actions that have an incidental effect on religious institutions").

When evaluating RFRA claims, we have therefore recognized that not all burdens alleged by plaintiffs amount to substantial burdens. *See Abdulhaseeb*, 600 F.3d at 1321 ("We are not willing to conclude, however, that every single presentation of a meal an inmate considers impermissible constitutes a substantial burden on an inmate's religious exercise."); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 654 (10th Cir. 2006) ("[W]e are not persuaded by Grace United's assertion that the Board's denial of a zoning variance for its proposed daycare operation constitutes more than an incidental burden on religious conduct."); *Kikumura*, 242 F.3d at 961 (requiring evidentiary proof from the plaintiff that an alleged burden was "substantial" and remanding to the district court). Furthermore, as we discuss in the following section, the existence of an accommodation may affect whether a law or policy burdens religious exercise and whether that burden is substantial.

5. Accommodations Can Lessen or Eliminate Burden

We finally note that accommodations function to lessen or eliminate the burden of a generally applicable law. In *Hobby Lobby*, this court said the stark choice between providing contraceptive coverage and paying steep fines constitutes a sufficiently substantial burden to warrant relief under RFRA. *Hobby Lobby*, 723 F.3d 1114.

Religious objectors are not always put to such a stark choice. When, as here, plaintiffs are offered an accommodation to a law or policy that would otherwise constitute a substantial burden, we must analyze whether the accommodation renders the potential burden on religious exercise insubstantial or nonexistent such that the law or policy that includes the accommodation satisfies RFRA.

Accommodations may eliminate burdens on religious exercise or reduce those burdens to *de minimis* acts of administrative compliance that are not substantial for RFRA purposes. The Supreme Court recognized this point in *Hobby Lobby* when it suggested an accommodation to exempt the plaintiff corporations from complying with the Mandate could satisfy RFRA concerns. *Hobby Lobby*, 134 S. Ct. at 2782 ("At a minimum, [the accommodation] does not impinge on the plaintiffs' religious belief that providing insurance coverage for the contraceptives at issue here violates their religion, and it serves HHS's stated interests equally well."); *see also id.* at 2786-87 (Kennedy, J., concurring). The D.C. Circuit observed that "[a] burden does not rise to the level of being substantial when it places an inconsequential or *de*

minimis burden on an adherent's religious exercise." *Priests for Life*, 772 F.3d at 246 (quotations, citations, and alterations omitted). Were it otherwise, our substantial burden inquiry would become a blunt tool incapable of recognizing the meaningful difference between forcing organizations to provide or pay for contraceptives and allowing them to opt out of that requirement. To determine whether the accommodation scheme in these cases renders the alleged burden on Plaintiffs' religious exercise nonexistent or insubstantial, we turn to the merits of Plaintiffs' RFRA arguments.

B. Substantial Burden Analysis

1. Plaintiffs' RFRA Arguments

The cases before us turn on whether complying with the accommodation constitutes a substantial burden. The Government does not dispute the sincerity of Plaintiffs' religious belief that they may not provide, pay for, or facilitate contraceptive coverage. The parties dispute whether the accommodation scheme substantially burdens the Plaintiffs' exercise of religion.

Plaintiffs oppose completing the Form or notifying HHS because they believe they are being asked to play a causal role in the delivery of contraceptive coverage and would be complicit or perceived to be complicit in the overall contraceptive delivery scheme by virtue of their opting out. They also allege their continuing involvement in the regulatory scheme is a substantial burden.[25]

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[25] The *Little Sisters* and *Reaching Souls* plaintiffs clarify that

The Government responds that completing the Form or notification does not involve Plaintiffs in the delivery of contraceptive coverage. The accommodation relieves Plaintiffs of their obligations under the Mandate, and when that occurs, federal law authorizes and obligates a health insurance issuer or TPA to provide or arrange for the delivery of contraceptive coverage to plan participants and beneficiaries who are entitled to that coverage under

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they "have never objected to merely identifying themselves so that the government can leave them alone." LS Supp. Br. II at 2 n.2; RS Supp. Br. II at 2 n.2. They have expressed satisfaction with the Supreme Court's injunctions pending appeal in *Little Sisters* and *Wheaton College*. LS Supp. Br. II at 1-2; RS Supp. Br. II at 2, 12; Oral Arg. in LS at 12:10-12:40. They nevertheless object to the recent modified accommodation promulgated by the Departments—the opt out letter to HHS—both because the self-certification requires more information about their group health plan than the aforementioned notice the Supreme Court proposed, and because of the "collateral consequences" that follow after they opt out. Oral Arg. in LS at 12:10-13:53.

The *Little Sisters* and *Reaching Souls* plaintiffs have not convincingly explained how the notice to HHS promulgated by the Departments would substantially burden their religious exercise but the notice crafted by the Supreme Court does not. In *Wheaton College*, the Supreme Court emphasized the plaintiffs had functionally notified the Departments they met the necessary requirements to obtain an accommodation, and said "[n]othing in this order precludes the Government from relying on this notice, to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage under the Act." 134 S. Ct. at 2807; *see also Zubik*, 2015 WL 3947586.

The *Southern Nazarene* plaintiffs object to affirmatively voicing a religious objection, including the type of notice described in *Wheaton College*. *See* Oral Arg. in SN at 24:30-25:20. They appear to believe that exemption from the Mandate—like the exemption for religious employers—is the only proper result under RFRA.

the ACA. The Government therefore argues the accommodation does not substantially burden Plaintiffs' religious exercise as a matter of law.

2. The Accommodation Scheme Eliminates Burdens on Religious Exercise

Under the accommodation scheme, the act of opting out relieves objecting religious non-profit organizations from complying with the Mandate and excuses them from participating in the provision of contraceptive coverage. The Departments designed the accommodation so that, upon receipt of the Form or a notification from the government, health insurance issuers and TPAs—not the objecting religious non-profit organization—provide contraceptive coverage and ensure the organization will not be required to provide, pay for, or otherwise facilitate that coverage. *See Mich. Catholic Conf.*, 755 F.3d at 391. We review this feature of the accommodation scheme to show how it eliminates burdens Plaintiffs otherwise would face, similar to the burdens the for-profit plaintiffs faced in *Hobby Lobby*.

First, the regulations specify a health insurance issuer must handle contraceptive coverage separately from the insurance provided under the religious non-profit organization's plan.

> A group health insurance issuer that receives a copy of the self-certification or notification . . . must (A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and (B) Provide separate payments for any contraceptive services required to be

> covered under § 147.130(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

45 C.F.R. § 147.131(c)(2)(i).[26]

Second, after a religious non-profit organization opts out, a health insurance issuer may not share the costs of providing contraception with the employer or employees.

> With respect to payments for contraceptive services, the [health insurance] issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services.

45 C.F.R. § 147.131(c)(2)(ii); *see also* 26 C.F.R. § 54.9815-2713A(c)(2)(ii); 29 C.F.R. § 2590.715-2713A(c)(2)(ii). TPAs are subject to similar requirements. *See* 26 C.F.R. § 54.9815-2713AT(b)(2); 29 C.F.R. § 2590.715-2713A(b)(2).

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[26] TPAs are not subject to this provision. Instead, a TPA that receives the Form or a notification from the government must provide or arrange for contraceptive coverage for plan participants and beneficiaries if it wishes to remain the TPA for the group health plan. *See* 26 C.F.R. § 54.9815-2713AT(b)(2); 29 C.F.R. § 2590.715-2713A(b)(2).

Finally, a health insurance issuer or TPA must, in communicating with plan participants or beneficiaries, send separate notice regarding contraceptive coverage from other plan notifications and make clear the employer neither administers nor funds contraceptive benefits. A health insurance issuer or TPA

> must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re- enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints.

26 C.F.R. § 54.9815-2713A(d); 29 C.F.R. § 2590.715-2713A(d); *see also* 45 C.F.R. § 147.131(d).

All of the foregoing remove the objecting religious non-profit organizations from providing contraceptive coverage, but Plaintiffs argue these protections of their religious liberty are insufficient because they still must deliver a Form or notify HHS to opt out of the Mandate. They contend this act substantially burdens their religious exercise because it "triggers" the provision of contraceptive coverage, makes them

complicit in the larger delivery scheme, and demands their ongoing involvement. We disagree. The accommodation relieves Plaintiffs of their statutory obligation to provide contraceptive coverage to their plan participants and beneficiaries, and as we discuss below, taking advantage of that accommodation is not a substantial burden on religious exercise.

3. The Accommodation Scheme Does Not Impose a Substantial Burden

To explain why the accommodation scheme does not substantially burden Plaintiffs' religious exercise; we look at the theories argued by the Plaintiffs and why they fail.

a. Opting out does not cause contraceptive coverage.

Although the accommodation scheme frees Plaintiffs from providing, paying for, or facilitating contraceptive coverage, they contend that, by delivering the Form or notifying HHS, they nevertheless "trigger" or cause contraceptive coverage. They do not. As we explain below, Plaintiffs' causation argument misconstrues the statutory and regulatory framework. Federal law, not the Form or notification to HHS, provides for contraceptive coverage without cost sharing to plan participants and beneficiaries. Because the mechanics of the accommodation scheme differ slightly for different types of plans, we examine how the regulations work for insured plans, self-insured plans, and self-insured church plans. But in each circumstance, Plaintiffs' causation argument fails to establish any burden on Plaintiffs' religious exercise.

i. Insured Plans

The plaintiffs with insured plans deal directly with a health insurance issuer and do not use a TPA.[27] They argue the accommodation scheme levies a substantial burden on their religious exercise because "insurance issuers will sell [them] plans that either (a) *expressly* include abortifacients; or (b) *functionally* include abortifacients by guaranteeing separate payments for them upon [their] execution and conveyance of the self- certification to the issuer." SN Br. at 18. We disagree.

The regulations do not burden the religious exercise of employers using insured plans. The ACA obligates both group health plans and health insurance issuers to provide contraceptive coverage. A religious non-profit organization may comply with the Mandate and provide coverage to its employees, opt out using the accommodation, or not comply with the law and pay fines. But in each instance, the health insurance issuer must ensure the organization's employees receive contraceptive coverage.

By delivering the Form or notifying HHS, an organization with an insured plan does not enable coverage—to the contrary, it simply notifies its health insurance issuer the organization will not be providing coverage. The health insurance issuer then has an independent and exclusive obligation to provide that coverage without cost sharing. The

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[27] The plaintiffs with insured plans are Oklahoma Wesleyan University and Oklahoma Baptist University. Southern Nazarene also has an insured plan for students and claims above $100,000.

relevant regulation states: "When a self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage in accordance with § 147.130." 45 C.F.R. § 147.131(c)(1)(i). Because the ACA obligates health insurance issuers to provide contraceptive coverage, they must meet this obligation independently and irrespective of the notification. The self-certification does not impose any responsibility; it merely makes it the issuer's *sole* responsibility rather than one shared with the group health plan itself.

Because federal law requires the health insurance issuer to provide coverage and the accommodation process removes an objecting organization from participating, plaintiffs with insured plans fail to show the accommodation burdens their religious exercise. The insured plaintiffs are not burdened when they are relieved of their responsibility and their insurers provide coverage as required by independent obligations set out in the ACA.

ii. Self-Insured Plans

The accommodation scheme permits religious non-profit organizations with self- insured plans to opt out by delivering the Form to their TPA or notifying HHS that they have a religious objection and will not comply with the Mandate. When the objecting organization opts out, the TPA that administers its group health plan is responsible for providing contraceptive coverage if it wishes to remain a TPA for the plan. In this section, we address this self-insured arrangement. In the next section, we consider the subset of self-insured plaintiffs having church plans over which the government lacks enforcement

authority under ERISA to compel the TPA to comply with its legal obligations.

1) Plaintiffs' argument

The only plaintiff with a self-insured plan subject to ERISA is Southern Nazarene. Southern Nazarene argues the accommodation scheme substantially burdens its religious exercise because the scheme requires it to "comply with the Mandate by either (a) setting up a self-insured plan that includes abortifacients; or (b) setting up a self-insured plan that functionally includes abortifacients by guaranteeing separate payments for them by the TPA upon the entity's execution of the self-certification." SN Br. at 18. Self-insured plaintiffs with ERISA-exempt church plans make similar claims.

Plaintiffs and the dissent emphasize that the TPA may arrange or provide coverage only after a religious non-profit organization opts out.[28] We consider this to be an uncontested and unremarkable feature of the

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[28] In *University of Notre Dame*, Judge Posner said: "By refusing to fill out the form Notre Dame would subject itself to penalties, but Aetna and Meritain would still be required to provide the services to the university's students and employees." *Univ. of Notre Dame*, 786 F.3d at 614.

We understand the mechanics of the accommodation to work differently. Aetna, as a health insurance issuer for Notre Dame's students, would be obligated to provide contraceptive coverage under the ACA whether or not Notre Dame delivered the Form or notification to HHS. *See* 42 U.S.C. § 300gg-13. Meritain, a TPA, would be obligated to provide contraceptive coverage only after Notre Dame delivered the Form or notification to HHS and opted out of the Mandate. *See* 26 C.F.R. § 54.9815-2713AT(b)(2); 29 C.F.R. § 2590.715-2713A(b)(2).

accommodation scheme.[29] The regulations state that when a religious non-profit organization opts out of providing contraceptive coverage, the TPA is notified that the organization will not administer or pay for contraceptive coverage, and that it must provide or arrange for contraceptive coverage without cost sharing if it wishes to continue administering the plan. 26 C.F.R. § 54.9815- 2713AT(b)(2); 29 C.F.R. § 2590.715-2713A(b)(2). The TPA is authorized and obligated to provide the coverage guaranteed by the ACA only if the religious non-profit organization that has primary responsibility for contraceptive coverage opts out of providing it.

Plaintiffs suggest this shift in legal responsibility for contraceptive coverage substantially burdens their religious exercise under RFRA. They argue their opting out would trigger, cause, or offer a "permission slip" for the delivery of contraception by allowing their TPA to provide the coverage. *Southern Nazarene*, 2013 WL 6804265, at *8. We disagree.

2) Opting out does not cause coverage

The ACA requires all group health plans to cover preventive services, including contraception, without cost sharing. Because a group health plan must include contraceptive coverage under the ACA, the

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[29] Even the dissent in *Wheaton College* recognized that a TPA need only provide the legally required contraceptive coverage when a religious non-profit organization takes advantage of the accommodation scheme. As Justice Sotomayor observed, "a third-party administrator bears the legal obligation to provide contraceptive coverage only upon receipt of a valid self-certification." *Wheaton Coll.*, 134 S. Ct. at 2814 n.6 (Sotomayor, J., dissenting from grant of injunction pending appeal).

accommodation scheme requires a TPA that administers a self-insured religious non-profit organization's group health plan to provide coverage if the organization opts out. The TPA must then arrange coverage for plan participants and beneficiaries if it wishes to continue functioning as the TPA for the objecting organization. This arrangement allows religious non-profit organizations to opt out and ensures plan participants and beneficiaries will receive the contraceptive coverage to which they are entitled by law.

Under this framework, the plaintiffs' argument does not identify a substantial burden on religious exercise. The opt out does not "cause" contraceptive coverage; it relieves objectors of their coverage responsibility, at which point federal law shifts that responsibility to a different actor. The ACA and its implementing regulations have already required that group health plans will include contraceptive coverage and have assigned legal responsibilities to ensure such coverage will be provided when the religious non-profit organization opts out. *See Wheaton College v. Burwell*, No. 14-2396, 2015 WL 3988356, at *4 (7th Cir. July 1, 2015); *E. Tex. Baptist Univ.*, 2015 WL 3852811, at *5-6; *Univ. of Notre Dame*, 786 F.3d at 613-14; *Geneva Coll.*, 778 F.3d at 437-38; *Priests for Life*, 772 F.3d at 254-55.[30] This arrangement is typical

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[30] To the extent Plaintiffs are specifically concerned about the language on the Form, that concern can be alleviated by taking advantage of the expanded accommodation and notifying HHS in writing. Plaintiffs need not use any terms they consider morally charged, like "certify," in their letter or email to HHS.

We further note the notification to HHS requires self-insured

of religious objection accommodations that shift responsibility to non-objecting entities only after an objector declines to perform a task on religious grounds.[31] Although a religious non- profit

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plaintiffs only to register their objection and identify their TPA—it does not require them to inform their TPA of any legal responsibilities to provide contraceptive coverage. When the opt out is submitted to HHS, the plaintiffs are relieved of their responsibilities. The government then takes steps to ensure that coverage is provided—HHS notifies the Department of Labor of the objection, and the Department of Labor then contacts the TPA to inform it of its duties under the ACA.

[31] Analogizing the opt out to conscientious objections to war, *see, e.g.*, *Priests for Life*, 772 F.3d at 245-46; *Univ. of Notre Dame*, 786 F.3d at 623-24 (Hamilton, J., concurring), should not overshadow the diverse array of mechanisms that federal, state, and local governments have used to accommodate objectors. Many religious objection schemes require an affirmative opt out before another person is required to step in and assume responsibility, and may require the objector to identify a replacement in the process. *See, e.g.*, 2015 Utah Laws Ch. 46 (accommodating religious objections to same- sex marriage of those working in county clerks' offices by requiring that "[a] county clerk shall . . . establish policies to ensure that the county clerk, or a designee of the county clerk who is willing, is available during business hours to solemnize a legal marriage for which a marriage license has been issued"); *Stormans Inc. v. Selecky*, 844 F. Supp. 2d 1172 (W.D. Wash. Feb. 22, 2012) (reinstating a "refuse and refer" approach where pharmacies need not provide contraception so long as they refer patients to alternative providers); Conn. Agencies Regs. § 19a-580d-9 (requiring health care providers who object to implementing a do-not-resuscitate order to "turn over care of the patient without delay to another provider who will implement the DNR order"); Internal Revenue Service, Tax Guide for Churches & Religious Organizations 18 (2013), www.irs.gov/pub/irs-pdf/p1828.pdf (explaining that a church may opt out of paying Social Security and Medicare taxes for religious reasons, shifting that responsibility to their

organization may opt out from providing contraceptive coverage, it cannot preclude the government from requiring others to provide the legally required coverage in its stead.[32] In short, the framework established by federal law, not the actions of the religious objector, ensures that plan participants and beneficiaries will receive contraceptive coverage.[33]

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employees to pay those taxes as though they were self-employed).

[32] Plaintiffs argue that, under the accommodation scheme, organizations with self- insured plans participate in the delivery of contraceptive coverage because their TPAs cannot arrange for that coverage unless and until plaintiffs deliver the Form or notification to HHS. We discuss above why this characterization of the accommodation scheme is incorrect, but we note here that this concern is specific to self-insured plans subject to ERISA. Plaintiffs could avoid the situation they deem objectionable by employing an insured plan, employing a self-insured church plan where the Departments lack authority to enforce the Mandate against their TPA, or administering the self-insured plan on their own in-house without using a TPA. Although the dissent notes that in- house administration is complex, Dissent at 22-23, Plaintiffs have not demonstrated it would be a substantial burden under RFRA. The fact that this alternative may be more expensive or difficult for plaintiffs does not necessarily make it a substantial burden. *See Braunfeld*, 366 U.S. at 605-06.

[33] In this regard, the accommodation scheme here is comparable to a conscientious objector accommodation scheme, which provides for someone to replace the objector when he opts out of military service. *See Priests for Life*, 772 F.3d at 245-46; *see also Univ. of Notre Dame*, 786 F.3d at 623-24 (Hamilton, J., concurring). Indeed, the conscientious objector scheme is administratively more burdensome than filing the Form or notifying HHS to opt out of the Mandate. A conscientious objector must register in the Selective Service System before being able to apply for an exemption, must complete an application and appear for an in-person interview, and, if the

exemption is granted, must perform two years of service for the government in lieu of military service. *See* 50 U.S.C. § 456j.

The dissent points to differences between the religious accommodation here and the conscientious objector scheme. But the comparison is apt. Courts have recognized that, to opt out of military service for religious reasons, a conscientious objector must notify the government of his objection knowing that someone else will take his place. *See Trans World Airlines v. Hardison*, 432 U.S. 63, 96 n.13 (1977) (Marshall, J., dissenting) (recognizing that "the effect of excusing conscientious objectors from military conscription is to require a nonobjector to serve instead, yet we have repeatedly upheld this exemption"); *Sheridan v. United States*, 483 F.2d 169, 174 (8th Cir. 1973) (acknowledging that when the plaintiff evaded induction, "another person had to be called in his place"); *McKenzie v. Schuppener*, 415 F.2d 1056, 1058 (5th Cir. 1969) (characterizing a conscientious objection application as "the situation where appellant must go to Vietnam or someone else go in his place"). Similarly, to opt out of the Mandate, the self-insured religious objector must notify the government knowing that a TPA will take its place.

And historically, it is not unprecedented to require an objector to identify a substitute for military service. To the contrary, the first federal draft statute permitted a draftee to avoid service only by either providing a substitute or paying $300. *See* Act of March 3, 1863, ch. 75, § 13, 12 Stat. 731, 733 (1863). As the dissent observes, the Civil War Enrollment Act sparked riots, Dissent at 14-15 n.7, but these were triggered by opposition to the draft itself, the inability of working class people to pay the $300 exemption, and anxiety about freed slaves entering the labor market after the war—not the fact that the draft law allowed draftees to name a substitute in their place. *See* Leslie M. Harris, In the Shadow of Slavery: African Americans in New York City, 1626-1863, at 279-88 (2003). Although Congress later eliminated the $300 commutation fee (except for conscientious objectors), it retained the provision allowing enrollees to supply a substitute. *See* Act of July 4, 1864, ch. 237, §§ 2, 10, 11, 13 Stat. 379, 379-80 (1864). To the extent the dissent suggests Chief Justice Taney's thoughts on the topic are relevant, Dissent at

3) Response to dissent

The dissent argues that our reasoning fails to appreciate the difference between insured and self-insured plans. With insured plans, the health insurance issuer bears legal responsibility to provide contraceptive coverage whether or not the religious non-profit has opted out. With self-insured plans, the TPA shoulders legal responsibility for coverage only after the religious non-profit has opted out.

We agree this is a distinction between these types of plans, but the dissent overplays its importance. *See* Dissent at 5 (deeming the difference between insured and self-insured plans "the critical distinction").[34] In both contexts, the ACA requires that group health plans cover contraceptive services, and a plaintiff knows coverage will be provided when it opts out. Plaintiffs do not dispute plan participants and beneficiaries' right to contraceptive coverage, nor do they contest the government's ability to require TPAs

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14-15 n.7, we note that he considered conscription itself unconstitutional, not the substitution provision. *See* Leon Friedman, *Conscription and the Constitution: The Original Understanding*, 67 Mich. L. Rev. 1493, 1546-48 (1969). In fact, Chief Justice Taney paid $100 to excuse his "body servant" from the draft. *See* Bernard C. Steiner, Life of Roger Brooke Taney: Chief Justice of the United States Supreme Court 511-12 (1922).

[34] Although the Mandate in the insured plan context assigns responsibility to provide contraceptive coverage to both the religious non-profit organization and its health insurance issuer, we do not believe this is the only permissible arrangement to permit religious accommodation. Requiring all accommodations to follow this model would be duplicative, costly, and impractical, and would foreclose a wide range of pragmatic arrangements that bring in substitutes when and only when a religious objector opts out of performing a task. *See, e.g.*, *supra* note 31.

and health insurance issuers to arrange for such coverage when a religious non- profit organization opts out. The only question before us is whether the plaintiffs are substantially burdened when they notify the government of their objection with the knowledge that another party will be required to provide coverage in their stead. The answer is no.

A religious accommodation tries to reconcile religious liberty with the rule of law. When faced with an unavoidable conflict between following the law or religious belief, RFRA provides a religious objector a means to challenge a generally applicable law and seek an exception to avoid following that law without having to break it. A statutory accommodation, as we have here, serves the same purpose. As noted above, this case is unusual because the Plaintiffs do not seek an accommodation where none exists, but instead challenge a statutory accommodation and argue that the process for seeking refuge in it substantially burdens their religious exercise. As to the self-insured plaintiffs, the dissent contends that if they opt out and transfer their duty to provide contraceptive coverage to the TPA, they necessarily cause such coverage. We disagree.

By opting out, the self-insured plaintiffs shift their duty to provide coverage to a TPA, but they do not change their plan participants and beneficiaries' entitlement to contraceptive coverage under federal law.[35] The dissent suggests, however, that because the

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[35] The dissent attempts to distinguish between health plan beneficiaries' entitlement to coverage and their actual receipt of coverage. This distinction breaks down under inspection. If a religious non-profit complies with the law by providing coverage,

plaintiffs can stymie coverage to their employees by breaking the law and incurring fines, and because opting out ultimately results in the TPAs' providing coverage, the plaintiffs' opting out therefore would cause contraceptive coverage. But this misconstrues the purpose of religious accommodation: to permit the religious objector both to avoid a religious burden and to comply with the law. If the plaintiffs wish to avail themselves of a legal means—an accommodation—to be excused from compliance with a law, they cannot rely on the possibility of their violating that very same law to challenge the accommodation.

In making this argument, the dissent focuses almost exclusively on whether the plaintiffs' opt out is a but-for cause of the TPAs' authority to provide contraceptive coverage.[36] It does, but this approach

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the beneficiaries are entitled to and receive coverage. If the non-profit opts out as the law allows, the beneficiaries likewise are entitled to and receive coverage, they just do not receive it from the non-profit. Only if the non-profit disobeys the law and refuses either to provide coverage or opt out would the beneficiaries not receive coverage (though they would still be entitled to it). If the opt out were not part of the law, the plaintiffs would be in the same position as the for-profits in *Hobby Lobby*—without a legal option to avoid providing coverage. But the accommodation scheme gives the plaintiffs a legal avenue to avoid providing coverage as opposed to non-compliance with the law with the attendant financial penalties.

[36] Plaintiffs and the dissent characterize the self-certification as giving the TPA "permission" to provide contraceptive coverage. Dissent at 9. This characterization ignores that the self-certification specifically registers an objection to providing coverage, relieves the plaintiffs of their obligation to provide it, and affirmatively distances the plaintiffs in numerous ways from providing coverage to plan participants and beneficiaries. *See*

misses the mark. Although opting out is necessarily a but-for cause of someone else—the TPA—providing contraceptive coverage, that is the point of an accommodation—shifting a responsibility from an objector to a non-objector. That is how a legislative policy choice—here, to afford women contraceptive coverage—can be reconciled with religious objections to that policy. We do not "den[y] the existence of any causation." Dissent at 10. We instead correctly identify the effect of opting out. The effect is to shift legal responsibility from the self-insured plaintiff to its TPA and relieve the plaintiff of the duty it considers objectionable. The effect is not the provision of contraceptive coverage, which would be afforded under the law whether or not the plaintiff opts out.

The ACA requires that either the religious non-profit organization or the TPA must provide contraceptive coverage for a self-insured group health plan, and the accommodation must be evaluated with that provision in mind. The scheme allows the religious non-profit organization to opt out of the responsibility of providing coverage and assigns that duty to the TPA administering the group health plan. Crucially, it does not change or expand contraceptive coverage beyond what federal law has already guaranteed. As the Supreme Court said in *Hobby*

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supra Section V.B.2. Equating the opt out to a permission slip is akin to "disregard[ing] the difference between a 'No Trespassing' sign and a welcome mat." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 245 (1995) (Stevens, J., dissenting).

The government is not compelling the plaintiffs to endorse or license something they consider objectionable; instead, the government is allowing them to decline a legal responsibility while requiring another party to perform it in their stead.

Lobby, the effect of the accommodation on employees "would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing." 134 S. Ct. at 2760.

The government has designed the accommodation so plaintiffs that opt out are freed from providing, paying for, or facilitating contraception, and the TPA's responsibility to provide coverage in their stead stems from federal law. Because this arrangement does not substantially burden the plaintiffs when they comply with the law, it does not matter whether the plaintiffs could prevent plan participants and beneficiaries from receiving coverage by violating the law. The dissent seems to suggest the ACA and its implementing regulations give self-insured plaintiffs discretion to decide whether their employees receive contraceptive coverage. The ACA and its implementing regulations do not, and the plaintiffs do not contend that they do. To the contrary, federal law generally requires that all people must have health insurance and that all health insurance must include preventive services, including contraceptive coverage. *See* 42 U.S.C. § 300gg-13.[37] And "although [the ACA] does not specifically mention third-party administrators, they administer 'group health plans,' which must include coverage. Nothing suggests the insurers' or third-party administrators' obligations would be waived if the plaintiffs refused to apply for the accommodation." *E. Tex. Baptist Univ.*,

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[37] The dissent asks, "if the self-insured plaintiffs do not opt out, who will provide the coverage for their plan participants and beneficiaries?" Dissent at 8. The answer is the self-insured plaintiffs, if they comply with the law. But this is the reason for the opt out: to allow the plaintiffs a legal means to avoid providing coverage.

2015 WL 3852811, at *5 (alterations omitted). The accommodation scheme does not give plaintiffs discretion to thwart their employees' right to contraceptive coverage by refusing to provide coverage and also refusing to register their objection so the government can make alternative arrangements to free them from providing coverage.[38] Because Congress has created a federal entitlement to contraceptive coverage and formulated a framework to guarantee that coverage will be provided even if plaintiffs decline to provide it, self-insured plaintiffs do not "cause" contraceptive coverage by exercising their ability to opt out.

4) No cause of substantial burden

In sum, the self-insured plaintiffs' causal analysis falters regarding the effect of opting out, which is to shift legal responsibility to provide contraceptive coverage from plaintiffs to their TPAs. When the government establishes a scheme that anticipates religious concerns by allowing objectors to opt out but ensuring that others will take up their responsibilities, plaintiffs are not substantially burdened merely because their decision to opt out cannot prevent the responsibility from being met.

To establish a claim under RFRA, about which the dissent says little, a plaintiff must show the government substantially burdens its sincere religious exercise. The ACA states group health plans

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[38] In the absence of any such discretionary power or responsibility, plaintiffs are not faced with the Hobson's choice the dissent describes. Dissent at 7-8, 12, 23. To the contrary, the accommodation eliminates any Hobson's choice by allowing plaintiffs to opt out of providing coverage.

must cover contraception, and the regulations state that if a religious non-profit organization opts out, that coverage will be provided by a TPA. Opting out does not cause the coverage itself; federal law does, by establishing a scheme that permits plaintiffs to opt out of their legal responsibility while simultaneously ensuring that plan participants and beneficiaries receive the coverage to which they are legally entitled. Allowing plaintiffs to opt out is not a substantial burden under RFRA.[39]

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[39] The dissent's theory of causation is not viable for the reasons discussed above. We also fail to see how it comports with the Supreme Court's orders in *Wheaton College*, 134 S. Ct. 2806, and *Zubik*, 2015 WL 3947586. In Part II.B.1, the dissent objects that "a third party's legal authority (*i.e.* permission) to provide the coverage is wholly dependent upon (*i.e.* caused by) the self-insured non-profit opting out." Dissent at 9. But that would be equally true of the arrangement proposed in the Supreme Court's orders in *Zubik*, which enjoined the Mandate only "[i]f the applicants ensure that the Secretary of Health and Human Services is in possession of all information necessary to verify applicants' eligibility under 26 CFR §54.9815-2713A(a) or 29 CFR §2590.715-2713A(a) or 45 CFR §147.131(b) (as applicable)," 2015 WL 3947586, at *1, and *Wheaton College*, which enjoined the Mandate only "[i]f the applicant informs the Secretary of Health and Human Services in writing that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services," 134 S. Ct. at 2807. (The plaintiffs in *Zubik* are self-insured and use TPAs. *See Geneva College*, 778 F.3d at 433. Wheaton College employs various insurance arrangements, but uses a TPA to deliver a portion of its coverage—specifically, its prescription drug coverage. *See Wheaton College v. Burwell*, 50 F. Supp. 3d. 939, 944 (N.D. Ill. 2014).) Wheaton College had already submitted a notice of its objection to the government, but the Supreme Court did not limit the injunction to that factual scenario. As Justice Sotomayor observed, "because Wheaton is materially indistinguishable from other nonprofits that object to

iii. Self-Insured Church Plans

The foregoing analysis of self-insured plans applies to the subset of self-insured church plans. We address additional reasons here to reject the church plan plaintiffs' RFRA claims.

The plaintiffs with self-insured church plans are in a unique position.[40] A TPA cannot be compelled to provide or arrange for contraceptive coverage if it administers a church plan under 26 U.S.C. § 414(e) that has not elected to comply with provisions of ERISA under 26 U.S.C. § 410(d)—which describes the self-insured church plans in the cases before us. The Departments concede they lack authority under ERISA to force these church plan TPAs to perform their regulatory responsibility. *See* 29 U.S.C. § 1003(b)(2). As a result, the Government can require the plaintiffs with self-insured church plans to use the Form or notify HHS to register their objection and opt out, but it has no enforcement authority to compel or penalize those plaintiffs' TPAs if they decline to provide or arrange for contraceptive coverage.[41]

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the Government's accommodation, the issuance of an injunction in this case will presumably entitle hundreds or thousands of other objectors to the same remedy." *Wheaton College*, 134 S. Ct. at 2814 n.6 (Sotomayor, J., dissenting).

[40] The plaintiffs with self-insured church plans include the Little Sisters, Reaching Souls, Truett-McConnell, and Mid-America Christian. The analysis in this section also applies to the plaintiffs that operate or administer self-insured church plans, which include the Christian Brothers Employee Benefit Trust, Christian Brothers Services, and GuideStone Financial Resources.

[41] If TPAs for self-insured church plans decide not to provide

The lack of enforcement authority makes any burden on plaintiffs with church plans even less substantial than the burden on plaintiffs with self-insured plans that are subject to ERISA. Nonetheless, plaintiffs with church plans offer the following arguments as to why the accommodation scheme might still burden their religious exercise. First, the Departments could decide to alter the regulations and assert authority over church plans under ERISA. Second, the mere act of signing the Form or delivering the notification may involve them in the provision of contraception, either by cooperating with the Departments or by providing authorization to a TPA, which then decides it wants to provide contraceptive coverage after all. Third, their opting out incentivizes TPAs to provide coverage even if they are exempt from ERISA. Fourth, the Government has not demonstrated why the plaintiffs must complete the self-certification if their TPAs can decline to provide contraceptive coverage. In addition to the reasons self-insured plans in general are not substantially

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contraceptive coverage, plan participants and beneficiaries would not get the coverage to which they are otherwise entitled under the ACA. The dissent suggests it is paradoxical to maintain the ACA ensures plan participants and beneficiaries will receive contraceptive coverage and also acknowledge TPAs for self-insured church plans may in fact decline to provide that coverage. Dissent at 11 n.4. The positions are consistent. The ACA requires all group health plans to provide contraceptive coverage, but because it can only enforce that requirement through ERISA, church plans that are exempt from ERISA do not face any consequences if they fail to meet it. Put differently, the ACA creates a legal duty for *all* group health plans, but the Government cannot enforce that duty against a narrow subset of self-insured church plans. The inability to enforce that duty does not mean the duty does not exist.

burdened by the accommodation scheme, we conclude the plaintiffs with self-insured church plans have failed to identify a substantial burden on religious exercise.

1) Hypothetical regulation

The plaintiffs argue the Departments could assert authority over church plans under ERISA at some point in the future. We assess the regulations as they currently exist, not amendments to ERISA's implementing regulations the Department of Labor may hypothetically promulgate. An "[i]njunction issues to prevent existing or presently threatened injuries. One will not be granted against something merely feared as liable to occur at some indefinite time in the future." *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931). Should the Departments assert ERISA authority over church plans at some later date, plaintiffs may then seek a preliminary injunction to prevent the Departments from enforcing the Mandate. Unless and until the Departments change their position, however, plaintiffs' speculative argument does not warrant a preliminary injunction. *See Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011).

2) No causation from church plan TPA notification

The plaintiffs contend completing the self-certification would be a substantial burden because it would allow TPAs to provide coverage to their group health plan participants and beneficiaries, even if the Departments cannot compel the TPA to do so under ERISA. But plaintiffs with self-insured church plans

are not substantially burdened by the requirement that they complete the Form or notification to HHS. As we explained in the previous section on self-insured plans, when a religious non-profit organization opts out of the Mandate, the requirement that the group health plan include contraceptive coverage is a product of federal law, not the product of the organization's opting out. Opting out frees plaintiffs from their obligation to provide contraceptive coverage under the ACA. The lack of substantial burden is especially evident when the group health plan is administered by a TPA that has made clear it will not provide contraceptive coverage on religious grounds. The Little Sisters' TPA, for example, is Christian Brothers, their co-plaintiff in this case. It is clear Christian Brothers need not, and will not, provide contraceptive coverage if the Little Sisters opt out of the Mandate.[42]

3) No incentive from church plan TPA notification

Even when TPAs for self-insured church plans indicate they may comply with the Mandate, the TPAs make that decision, and the objecting religious non-profit organization is not substantially burdened. The plaintiffs in *Reaching Souls* argue one of their TPAs, Highmark, has indicated it will provide contraceptive coverage if they opt out of the Mandate. The *Reaching Souls* plaintiffs argue their act of opting out would not only provide Highmark with permission to provide

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[42] Plaintiff TPAs that administer church plans are not substantially burdened for similar reasons. In the absence of any enforcement power, the Government cannot levy fines against them for declining to provide contraceptive coverage.

contraceptive coverage, but would incentivize it to do so because Highmark could then seek reimbursement from the government.

Plaintiffs fail to demonstrate the reimbursement provision actually gives TPAs an incentive to provide coverage. They claim a TPA that receives the Form or a letter from the government "becomes eligible for government payments that will both cover the TPA's costs and include an additional payment (equal to at least 10% of costs) for the TPA's margin and overhead." LS Br. at 16. At a hearing in *Reaching Souls*, counsel for the Government seemed to accept this characterization. But the regulations themselves expressly contradict this reading. They state the payment for margin and overhead goes to health insurance issuers who act as intermediaries for the reimbursement, and need not go to TPAs.[43] *See* 45 C.F.R. § 156.50(d)(5) (specifying health insurance issuers must reimburse TPAs for "the portion of the adjustment attributable to the total dollar amount of the payments for contraceptive services submitted by the third party administrator" but that "[n]o such payment is required with respect to the allowance for

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[43] The Departments credit the health insurance issuer for (1) the total dollar amount of the TPA's payments for contraceptive coverage, and (2) an allowance of at least 10% for administrative costs and margin. *See* 45 C.F.R. § 156.50(d)(3). The health insurance issuer then pays the TPA for the total dollar amount of the TPA's payments for contraceptive coverage, but is not required to pay the TPA the allowance for administrative costs and margin. *See* 45 C.F.R. § 156.50(d)(5). As a result, the regulations require only that a TPA receive repayment for what it has actually spent providing contraceptive coverage. A reimbursement solely for costs incurred would not generate a profit or offer any incentive to provide contraceptive coverage.

administrative costs and margin").

Moreover, even if TPAs were to receive a payment for margin and overhead—set at 15% of costs for 2014—plaintiffs do not demonstrate this allowance actually functions as an incentive to provide contraceptive coverage rather than repayment for the administrative costs TPAs incur by stepping in to arrange for or provide coverage. Plaintiffs have not demonstrated the allowance for administrative overhead actually generates a profit for TPAs, nor have they demonstrated that the allowance would incentivize TPAs to provide coverage where they otherwise would not.

4) The Government may require affirmative objection

Plaintiffs finally argue that if the Departments lack ERISA enforcement authority against TPAs of self-insured church plans, the Government has no reason to require religious non-profit organizations to comply with the accommodation scheme and deliver the Form or notify HHS. It is the plaintiffs' burden, however, to state a prima facie case under RFRA. Because they cannot establish that signing the Form or notifying HHS constitutes a substantial burden on their religious exercise, we do not question the Departments' interest in requiring them to opt out of the Mandate to avoid penalties for failure to provide contraceptive coverage.[44]

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[44] The Departments have a sound reason to require an affirmative opt out—not all religious organizations share the beliefs of the Little Sisters, Reaching Souls, Truett- McConnell, and Mid-America Christian. The parties agree that the

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We conclude the Plaintiffs' causation arguments do not establish a burden on their religious exercise, much less a substantial burden, because opting out would not trigger, incentivize, or otherwise cause the provision of contraceptive coverage.[45] We therefore turn to Plaintiffs' argument that the act of opting out and the administrative requirements associated with the accommodation make them feel or appear complicit in the overall contraceptive coverage scheme.

e. No substantial burden from complicity

The accommodation relieves Plaintiffs from providing, paying for, or facilitating contraceptive coverage, and federal law requires health insurance issuers and TPAs to provide contraceptive coverage when religious non-profit organizations take advantage of the accommodation. Plaintiffs argue the act of opting out would nevertheless substantially burden their religious exercise because they believe delivering the Form or notification to HHS would make them complicit in the overall scheme to deliver contraceptive coverage. They wish to play no part in it. We find this argument unconvincing for a number

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Departments can require non-objecting employers to provide contraceptive coverage under their group health plans. To enforce that general requirement, the Departments may require objecting employers to affirmatively voice their objection instead of assuming all religious non-profit organizations share the plaintiffs' beliefs.

[45] Under these circumstances, as the Third Circuit observed, "the burden is not merely attenuated at the outset but totally disconnected from the appellees." *Geneva Coll.*, 778 F.3d at 442.

of reasons.

First, the purpose and design of the accommodation scheme is to ensure that Plaintiffs are *not* complicit—that they do not have to provide, pay for, or facilitate contraception. Plaintiffs' concern that others may believe they condone the Mandate is unfounded. Opting out sends the unambiguous message that they *oppose* contraceptive coverage and refuse to provide it, and does not foreclose them from objecting both to contraception and the Mandate in the strongest possible terms.

Second, to the extent Plaintiffs assert that completing the Form or notification violates their religious beliefs, they state a necessary but not a sufficient predicate for a RFRA claim. Under RFRA, they must establish that completing the Form or notification substantially burdens their religious exercise; otherwise, this argument could be used to avoid almost any legal obligation that involves a form. Plaintiffs do not object to signing forms and paperwork generally—they object to the Form or notification to HHS, and they do so because they believe it involves them in directly or indirectly providing, paying for, or facilitating contraceptive coverage, which they oppose as a matter of religious conviction. As we have explained, the Plaintiffs misstate their role in the accommodation scheme. RFRA does not require us to defer to their erroneous view about the operation of the ACA and its implementing regulations.[46]

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[46] Plaintiffs cite *Thomas* for the proposition that we cannot question the theological merit of their religious beliefs. *See*

Thomas, 450 U.S. at 715 ("We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one."). We agree with that proposition, but we may—indeed, we must— determine whether the accommodation scheme substantially burdens their religious exercise.

In *Thomas*, Mr. Thomas believed he could not participate in the production of war materials. *Id.* at 709. The government argued Mr. Thomas's beliefs did not warrant protection by suggesting those beliefs were inconsistent and not shared by his co-religionists. *Id.* at 714-15. The Supreme Court specifically rejected these attempts to impeach Mr. Thomas's religious beliefs, *id.* at 715-16, but the Court was not confronted with the question of whether those beliefs were substantially burdened. Both the Supreme Court and the Tenth Circuit have indicated that accepting a plaintiff's religious belief does not foreclose an inquiry into whether religious exercise has been substantially burdened. *See, e.g.*, *Hernandez*, 490 U.S. at 699; *Kikumura*, 242 F.3d at 961.

The Government does not question Plaintiffs' religious beliefs that contraception is sinful and they cannot be involved in providing, paying for, or facilitating contraceptive coverage. But Plaintiffs go beyond *Thomas* when they insist that we cannot question whether opting out makes them complicit in providing contraceptive coverage. We may properly consider that opting out excuses them from providing coverage, does not cause that coverage to be extended to plan participants and beneficiaries, and involves only routine administrative tasks that are not substantial burdens under RFRA. *See Little Sisters*, 6 F. Supp. 3d at 1239 ("Thus, Plaintiff's contention that the Court cannot look behind their statements about what offends their religious beliefs is well-supported. However, the Court is under no such restriction with regard to Plaintiffs' construction of how the Final Rules operate, including the administrative burdens imposed on the parties by these regulations.").

For these reasons, *Thomas* is inapposite when the inquiry focuses on whether a burden is substantial. It does not preclude courts from examining the relationship between a sincerely held religious belief and the alleged burden imposed by the

Third, because the accommodation does not involve them in providing, paying for, facilitating, or causing contraceptive coverage, Plaintiffs' only involvement in the scheme is the act of opting out. Plaintiffs are not substantially burdened solely by the *de minimis* administrative tasks this involves. All opt-out schemes require some affirmative act to free objectors from the obligations they would otherwise face. The Plaintiffs' logic would undermine conscientious objection schemes that require the objection to be made, relieve objectors of their obligations, but assign those obligations to other, non-objecting actors in their stead. *See, e.g.*, *Gillette v. United States*, 401 U.S. 437 (1971) (acknowledging a petitioner must complete an exemption application to obtain conscientious objector status in wartime); *Welsh v. United States*, 398 U.S. 333 (1970) (same).[47]

Government. This important distinction prevents the Government from having to survive strict scrutiny whenever a plaintiff misunderstands the burden being placed upon them—for example, if Mr. Thomas had been required to produce equipment for farming and sincerely, but incorrectly, believed that equipment was being produced for war. *See, e.g.*, *Priests for Life*, 772 F.3d at 249 n.14.

[47] As other courts have observed, invalidating the accommodation scheme would run contrary to many other laws allowing objectors to opt out of government programs and requirements. *See Priests for Life*, 772 F.3d at 245 (deeming Plaintiffs' argument against the accommodation scheme "extraordinary and potentially far reaching"); *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 557 (7th Cir. 2014), *vacated and remanded sub nom.*, *Univ. of Notre Dame v. Burwell*, 135 S. Ct. 1528 (2015) ("The novelty of Notre Dame's claim—not for the exemption, which it has, but for the right to have it without having to ask for it—deserves emphasis. . . . What makes this case and others like it involving the contraception exemption

Having to file paperwork or otherwise register a religious objection, even if one disagrees with the ultimate aim of the law at issue, does not alone substantially burden religious exercise.

The Government may therefore require religious objectors to complete *de minimis* administrative tasks to opt out. Filing the Form or notifying HHS easily fits within this category. The Departments have made opting out of the Mandate at least as easy as obtaining a parade permit, filing a simple tax form, or registering to vote—in other words, a routine, brief administrative task. The purpose of the Form or notification to HHS is to extricate Plaintiffs from their legal obligation to provide contraceptive coverage. Opting out ensures they will play no part in the provision of contraceptive coverage, prohibits TPAs and health insurance issuers from sharing the costs of providing coverage with them, and requires notice to employees that they do not administer or fund contraceptive services.

The notification to HHS is especially minimal, as it requires Plaintiffs only to register their objection with HHS and does not require any contact with their health insurance issuers or TPAs. Although Plaintiffs must tell HHS which health insurance issuer or TPA they use to opt out of the Mandate, this is not a substantial burden on religious exercise.[48] It is the

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paradoxical and virtually unprecedented is that the beneficiaries of the religious exemption are claiming that the exemption process itself imposes a substantial burden on their religious faiths.").

[48] Plaintiffs using the Form need only enter the name of the

kind of administrative task the Departments can require of religious believers in the administration of governmental programs. *See Priests for Life*, 772 F.3d at 246; *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 305-06 (1985); *see also Jimmy Swaggart Ministries v. Bd. of Equaliz. of Cal.*, 493 U.S. 378, 395 (1990); *Hernandez*, 490 U.S. at 696-97. When understood in light of the ACA's requirement that group health plans and health insurance issuers provide contraceptive coverage and the manner in which the accommodation relieves Plaintiffs of providing that coverage, identifying one's TPA in a letter to HHS is at most a minimal burden and certainly not a substantial one.

Finally, Plaintiffs are not substantially burdened

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objecting organization, name and title of the individual authorized to make the certification on behalf of the organization, and the mailing address, email address, and phone number of that individual. That person signs, dates, and sends the form to their TPA or health insurance issuer. Employers are required to keep the Form on file for six years. The Plaintiffs have leeway in drafting a notification to HHS, which need only include

> the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on sincerely held religious beliefs to providing coverage of some or all contraceptive services (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers.

79 Fed. Reg. at 51,094-95.

when, after they opt out and are relieved of their obligations under the Mandate, health insurance issuers or TPAs must provide contraception to plan participants and beneficiaries. Plaintiffs sincerely oppose contraception, but their religious objection cannot hamstring government efforts to ensure that plan participants and beneficiaries receive the coverage to which they are entitled under the ACA. "Religious objectors do not suffer substantial burdens under RFRA where the only harm to them is that they sincerely feel aggrieved by their inability to prevent what other people would do to fulfill regulatory objectives after they opt out." *Priests for Life*, 772 F.3d at 246. Pre-*Smith* case law and RFRA's legislative history underscore that religious exercise is not substantially burdened merely because the Government spends its money or arranges its own affairs in ways that plaintiffs find objectionable. *See Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450-54 (1988); *Bowen*, 476 U.S. at 699-700; *Tony & Susan Alamo Found.*, 471 U.S. at 303; S. Rep. No. 103-111, at 9 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1898 ("[P]re-*Smith* case law makes it clear that strict scrutiny does not apply to government actions involving only management of internal Government affairs or the use of the Government's own property or resources."). RFRA does not prevent the Government from reassigning obligations after an objector opts out simply because the objector strongly opposes the ultimate goal of the generally applicable law.

Plaintiffs' complicity argument therefore fails. Opting out would eliminate their complicity with the Mandate and require only routine and minimal

administrative paperwork, and they are not substantially burdened by the Government's subsequent efforts to deliver contraceptive coverage in their stead.

f. No burden from ongoing requirements

As a final argument, Plaintiffs deny the act of opting out would free them from further involvement in the provision of contraceptive coverage. They argue the accommodation scheme would require their ongoing participation, and give two examples to support this claim.

First, Plaintiffs argue they would remain involved because the Departments are commandeering their group health plans to provide contraceptive coverage to their employees. They note their TPA or health insurance issuer can provide coverage only as long as plan participants and beneficiaries remain employed with the religious non-profit organization.

Plaintiffs have not shown, assuming they opt out, how the provision of coverage to plan participants and beneficiaries through the health insurance issuer or TPA would substantially burden their religious exercise. Plaintiffs' plan participants and beneficiaries are not guaranteed contraceptive coverage without cost sharing because they work for the Plaintiffs; they are guaranteed contraceptive coverage under the ACA. The ACA mandates health insurance that includes contraceptive coverage. *See* 42 U.S.C. § 300gg-13(a)(4). Plaintiffs' theory would not only relieve them of complying with the Mandate, it would prevent health insurance issuers and TPAs from stepping in under the ACA to provide plan

participants and beneficiaries with the coverage they are entitled to receive under federal law.

Second, Plaintiffs object that they must (a) notify their TPA or health insurance issuer when employees join or leave their broader health insurance scheme, and (b) complete the self-certification or notification to HHS when they create or terminate a relationship with a TPA or health insurance issuer. As to the first requirement, employers already must notify their TPA or health insurance issuer when they hire or fire employees. The communication with the TPA or health insurance issuer regarding general health insurance coverage for entering or exiting plan participants and beneficiaries would occur regardless of any legal obligation under the accommodation scheme. The latter requirement, however, is an obligation specific to the accommodation scheme. An insured or self-insured employer using the Form must send it to "each" TPA or health insurance issuer as the employer forms contractual relationships with them. 26 C.F.R. § 54.9815-2713AT(b)(1)(ii); 29 C.F.R. § 2590.715-2713A(b)(1)(ii). If the employer instead uses the notification process, the regulations state: "If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services." 26 C.F.R. § 54.9815-2713AT(b)(1)(ii)(B); 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B).

Once again, this does not constitute a substantial burden. The only new requirement is that employers must complete the Form or notify HHS of their objection when they contract with a new health insurance issuer or TPA. Plaintiffs do not argue the

time, cost, or energy required to comply with this requirement constitutes a substantial burden; they argue it is the moral significance of their involvement which burdens their religious exercise.[49] If the first self-certification is not a substantial burden, a second or third self-certification would not be substantially burdensome given the extremely minimal administrative requirements of the Form or notification. As we have discussed above, *de minimis* administrative requirements do not themselves amount to substantial burdens on religious liberty. *See Tony & Susan Alamo Found.*, 471 U.S. at 305-06; *see also Jimmy Swaggart Ministries*, 493 U.S. at 394-95; *Hernandez*, 490 U.S. at 696-97. If the actual delivery of the Form or notification is not a substantial burden, a contingent administrative requirement to update the Form or notification is not either.

The regulations require the Plaintiffs to complete the Form or deliver the notification if they wish to opt out. But this ministerial act to opt out is not a substantial burden on religious exercise, nor are the collateral requirements of the scheme. The Departments have allowed Plaintiffs to opt out of a neutral and generally applicable requirement imposed by federal law, and have done so in a manner that affirmatively distances those organizations from the provision of contraceptive coverage that other employers must provide. It is not a substantial burden to require organizations to provide minimal

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[49] The interim final rules estimate "the total annual burden for preparing and providing the information in the self-certification or notice to HHS will require approximately 50 minutes for each eligible organization with an equivalent cost burden of approximately $53." 79 Fed. Reg. at 51,097.

information for administrative purposes to take advantage of that accommodation.

C. Strict Scrutiny

Because we determine Plaintiffs have failed to demonstrate a substantial burden on their religious exercise, we need not address whether the Departments have shown a compelling state interest and adopted the least restrictive means of advancing that interest.[50]

D. Conclusion

In the absence of a substantial burden, Plaintiffs have not demonstrated a strong likelihood of success on the merits of their RFRA claim, nor have they demonstrated they will suffer irreparable injury if an injunction is denied. Accordingly, a preliminary injunction on RFRA grounds is inappropriate.

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[50] We recognize third-party rights and interests are at stake in this litigation— namely, that plan participants and beneficiaries are entitled by law to contraceptive coverage without cost sharing. When evaluating RFRA and Free Exercise claims, courts properly consider the impact of religious liberty claims on pre-existing rights holders. *Hobby Lobby*, 134 S. Ct. at 2760 (emphasizing "[t]he effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero"); *see Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985); *Yoder*, 406 U.S. at 230; *Sherbert*, 374 U.S. at 409; *Braunfeld*, 366 U.S. at 604-05. Because we determine Plaintiffs have not demonstrated a substantial burden on their religious exercise, we do not reach the strict scrutiny analysis where the rights and interests of third parties are properly weighed.

VI. FIRST AMENDMENT

Although the district courts focused almost exclusively on RFRA, Plaintiffs also raised constitutional claims. They argue the accommodation scheme violates the Free Exercise and Establishment Clauses of the First Amendment by exempting religious employers from the Mandate but requiring religious non-profit organizations to seek an accommodation.[51] Plaintiffs also argue the

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[51] In this discussion of First Amendment claims, "Plaintiffs" refers only to the plaintiffs in *Little Sisters* and *Reaching Souls*, and not *Southern Nazarene*. All of the plaintiffs raised First Amendment claims in their complaints, but only the *Little Sisters* and *Reaching Souls* plaintiffs preserved these claims in their subsequent motions for a preliminary injunction and briefs on appeal. App. in LS at 57a-66a, 136a-38a; App. in RS at A65-74, A145-49.

The district courts in *Little Sisters* and *Reaching Souls* did not reach the First Amendment claims. In *Little Sisters*, the court found the plaintiffs' assertion of irreparable harm—which they were required to show to obtain a preliminary injunction, *see Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009)—was based only on RFRA. *See Little Sisters*, 6 F. Supp. 3d at 1245. In *Reaching Souls*, the court determined it did not need to reach First Amendment claims because it granted a preliminary injunction on RFRA grounds. *See Reaching Souls*, 2013 WL 6804259, at *8 n.9.

On appeal, we consider the First Amendment claims in both cases. First, the *Little Sisters* plaintiffs made a sufficient argument before the district court. They expressly sought a preliminary injunction on First Amendment as well as RFRA grounds. App. in LS at 136a-138a. They did not elaborate on their First Amendment claims in the irreparable harm analysis, but "[w]hen an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Kikumura*, 242 F.3d at 963 (quotations omitted). Second,

accommodation scheme simultaneously compels and silences their speech in violation of the Free Speech Clause of the First Amendment. We disagree and conclude the accommodation scheme comports with the First Amendment. We note that the same standard of review we identified for the RFRA claim applies to the First Amendment claims.

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although we reverse the district court's grant of a preliminary injunction on RFRA grounds in *Reaching Souls*, plaintiffs there raised the question whether that preliminary injunction is appropriate on First Amendment grounds. "If the district court fails to analyze the factors necessary to justify a preliminary injunction, this court may do so if the record is sufficiently developed." *Westar Energy, Inc. v. Lake*, 552 F.3d 1215, 1224 (10th Cir. 2009); *see also Hobby Lobby*, 723 F.3d at1145 ("The record we have is the record the parties chose to create below—it is the record they deemed sufficient for the district court to decide the preliminary injunction question. For each element, we believe this record suffices for us to resolve each of the remaining preliminary injunction factors."). Because the First Amendment claims in both *Little Sisters* and *Reaching Souls* are legal questions that have been fully briefed on appeal, we resolve those questions in this opinion rather than remanding them to the district courts and prolonging this litigation.

By contrast, the *Southern Nazarene* plaintiffs included First Amendment claims in their complaint, but did not assert them in their motion for a preliminary injunction or accompanying memorandum of law. As a result, the district court did not reach any First Amendment claims in its decision. *See Southern Nazarene*, 2013 WL 6804265. Moreover, the *Southern Nazarene* plaintiffs do not make First Amendment claims in their opening brief on appeal.

Although we believe our First Amendment analysis applies to all group health plans and does not depend on whether they are insured, self-insured, or self-insured church plans, we note *Little Sisters* and *Reaching Souls* involve only self-insured church plans that are not subject to ERISA, and the insured and self-insured plans discussed in *Southern Nazarene* are not before us.

A. Free Exercise Clause

Plaintiffs contend the ACA and its implementing regulations violate the Free Exercise Clause by exempting some religious objectors—churches and their "integrated auxiliaries"—from the Mandate, while requiring others—specifically, religious non-profit organizations—to comply with the Mandate, seek an accommodation, or pay substantial fines. They have not explained how their Free Exercise claim differs from their Establishment Clause claim, nor do they explain how they could prevail under the standard in *Smith* if they are unlikely to succeed under RFRA. Because we conclude the Mandate and accommodation scheme are neutral and generally applicable laws, they are subject only to rational basis review, which they survive.

1. Legal Background

The First Amendment's religion clauses state: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. 1. To resolve challenges under the Free Exercise Clause, we use a well- established framework. If a law is neutral and generally applicable, it does not violate the Free Exercise Clause "even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *see Smith*, 494 U.S. at 878-80. "A law is neutral so long as its object is something other than the infringement or restriction of religious practices." *Grace United*, 451 F.3d at 649-50. A law that is facially neutral may nevertheless fail the neutrality test if it covertly targets religious

conduct for adverse treatment. *Lukumi Babalu*, 508 U.S. at 534.

To determine whether a law is generally applicable, we ask if the "legislature decide[d] that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Id.* at 542-43. "[A] law that is both neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a constitutional challenge." *Grace United*, 451 F.3d at 649.

2. The Mandate and Accommodation Scheme are Neutral

The Mandate and the accommodation scheme are neutral laws. *See Priests for Life*, 772 F.3d at 267-69; *Mich. Catholic Conf.*, 755 F.3d at 393-94. The Mandate is facially neutral with regard to employers, and neither the history nor the text of the ACA and its implementing regulations suggest the Mandate was targeted at a particular religion or religious practice. Plaintiffs cannot show Congress or HHS "had as their object the suppression of religion." *Lukumi Babalu*, 508 U.S. at 542. To the contrary, the Mandate arose from concerns about the personal and social costs of barriers preventing women from receiving preventive care, including reproductive health care. *See* IOM, *Clinical Preventive Services for Women: Closing the Gaps* 102-03 (2011), *available at* www.nap.edu/catalog.php?record_id=13181. The accommodation scheme was developed to facilitate the free exercise of religion, not to target religious groups or burden religious practice. To that end, the Departments expanded the religious employer

exemption and religious non-profit organization accommodation to respond to the concerns of religious groups. The Plaintiffs' apparent dissatisfaction with the accommodation offered to them does not mean the Mandate or the accommodation scheme is non-neutral.

3. The Mandate and Accommodation Scheme are Generally Applicable

The Mandate and the accommodation scheme are also generally applicable. *See Priests for Life*, 772 F.3d at 267-69; *Mich. Catholic Conf.*, 755 F.3d at 393-94. Plaintiffs cannot show Congress or the Departments sought to impose the Mandate only against religious groups; to the contrary, the Mandate applies to all employers with more than fifty employees using non-grandfathered health plans.[52] "The exemptions do not

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[52] *Smith* stated that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason." *Smith*, 494 U.S. at 884 (quotations and citation omitted). But as we noted in *Grace United*, "we have already refused to interpret *Smith* as standing for the proposition that a secular exemption automatically creates a claim for a religious exemption." *Grace United*, 451 F.3d at 651. We have instead held:

> a system of individualized exemptions is one that gives rise to the application of a subjective test. Such a system is one in which case-by-case inquiries are routinely made, such that there is an individualized governmental assessment of the reasons for the relevant conduct that invites considerations of the particular circumstances involved in the particular case.

Axson-Flynn v. Johnson, 356 F.3d 1277, 1297 (10th Cir. 2004) (quotations and citations omitted). None of the categorical exemptions enacted by the ACA and its implementing

render the law so under-inclusive as to belie the government's interest in protecting public health and promoting women's well-being or to suggest that disfavoring Catholic or other pro-life employers was its objective." *Priests for Life*, 772 F.3d at 268. Plaintiffs fail to demonstrate the accommodation scheme targets religious conduct or was created with the objective of disfavoring particular faiths. *Lukumi Babalu*, 508 U.S. at 542-43. To the contrary, the Mandate was enacted as part of a larger program of health care reform, and both the exemption for religious employers and the accommodation for religious non- profit organizations demonstrate federal deference to religious liberty concerns and were promulgated to facilitate rather than inhibit the free exercise of religion.

4. The Mandate and Accommodation Scheme Have a Rational Basis

Rather than make an argument based on the rational relationship standard, Plaintiffs instead contend our decision in *Hobby Lobby* precludes us from finding that public health and gender equality, without greater specificity, constitute compelling governmental interests. But, as we have explained, the compelling interest test does not apply; the rational basis test does. *Grace United*, 451 F.3d at 649. The Government observes that in the cases before us, the accommodation scheme rationally serves the twin interests of facilitating religious exercise and filling

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regulations establish a system of individualized objections. And for the reasons detailed above, we believe the accommodation scheme effectively relieves objecting religious non-profit organizations of their obligations.

coverage gaps resulting from accommodating that religious exercise.

On rational basis review, these interests are sufficient. Alleviating governmental interference with religious exercise, which the accommodation scheme does, is a permissible legislative purpose. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987). And we need not scrutinize whether the Government's interest in public health and gender equality is more compelling in this case than in *Hobby Lobby*. We need only determine that public health and gender equality are *legitimate* state interests. We believe they meet this more permissive standard, which is not foreclosed by our compelling interest analysis in *Hobby Lobby*. *See, e.g.*, *Hobby Lobby*, 723 F.3d at 1143 (determining public health and gender equality are too broad to satisfy the compelling interest test but noting "[w]e recognize the importance of these interests").[53] The accommodation scheme advances both the free exercise of religion and the Government's legitimate

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[53] *See also Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (identifying "a compelling interest in eliminating discrimination against women"); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (1984) ("Assuring women equal access to such goods, privileges, and advantages clearly furthers compelling state interests."); *Prince v. Massachusetts*, 321 U.S. 158, 165-67 (1944) (upholding child labor laws against a free exercise challenge on health and welfare grounds); *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (upholding a mass vaccination program against a liberty challenge on health and welfare grounds); *see also Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (determining a compelling interest in eradicating racial discrimination "substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs").

interests in public health and gender equality. *See Hobby Lobby*, 134 S. Ct. at 2759 ("We therefore conclude that [the accommodation] system constitutes an alternative that achieves all of the Government's aims while providing greater respect for religious liberty.").

Furthermore, when applying the rational basis test, we are not limited to interests specifically articulated by the Departments. We may look to any conceivable legitimate governmental interest, and "the burden is upon the challenging party to negative any reasonably conceivable state of facts that could provide a rational basis." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001) (citations and internal quotations omitted). The more specific governmental interest in health by ensuring access to contraception without cost sharing, which we did not specifically address in *Hobby Lobby*, would constitute a legitimate interest conceivably advanced by the accommodation scheme. *See Hobby Lobby*, 723 F.3d at 1160 (Bacharach, J., concurring) ("[T]he plurality does not mention the public interest that the government had relied on at the preliminary-injunction hearing: the health reasons for promoting employee access to emergency contraceptives."). The Departments' recognized interest in the uniformity and ease of administration of its programs would also meet this standard. *See, e.g.*, *Bowen*, 476 U.S. at 707; *Hernandez*, 490 U.S. at 682; *United States v. Lee*, 455 U.S. 252, 258-59 (1982).

The Mandate and accommodation scheme easily pass the rational basis test. Because the Mandate is both neutral and generally applicable and supported by a rational basis, Plaintiffs fail to make out a

plausible claim under the Free Exercise Clause.

B. Establishment Clause

Plaintiffs contend that exempting churches and integrated auxiliaries from the Mandate but requiring religious non-profit organizations to seek an accommodation violates the Establishment Clause. We disagree. Because the Departments have chosen to distinguish between entities based on neutral, objective organizational criteria and not by denominational preference or religiosity, the distinction does not run afoul of the Establishment Clause.

1. Organizational Distinctions Well-Established in Federal Law

Federal law distinguishes between different types of religious organizations, and as we discuss below, this differentiation is constitutionally permissible. Under the ACA and its implementing regulations, a religious employer "is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (a)(3)(A)(iii) of the Internal Revenue Code of 1986, as amended." 45 C.F.R. § 147.131(a). The regulations at issue in this case draw on the tax code's distinction between houses of worship and religious non-profits, a "longstanding and familiar" distinction in federal law. *Priests for Life*, 772 F.3d at 238; *see also Geneva Coll.*, 778 F.3d at 443 (determining it was permissible for the Departments to base the exemption on the IRC's provision "because that provision was a bright line that was already statutorily codified and frequently applied").

Exempting churches while requiring other

religious objectors to seek an accommodation is standard practice under the tax code. The IRC and other regulations award benefits to some religious organizations—typically, houses of worship—based on articulable criteria that other religious organizations do not meet. *See* 26 U.S.C. § 6033(a)(3)(A)(i), (iii). Churches, their integrated auxiliaries, and conventions or associations of churches are automatically considered tax exempt and need not notify the government they are applying for recognition, but other religious non-profit organizations must apply for tax-exempt status if their annual gross receipts are more than $5,000. *See id.* § 508(a), (c)(1)(A). Similarly, churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order need not file tax returns, but religious non-profit organizations with gross receipts above $5,000—even if they are tax-exempt—must file annually. *Id.* § 6033(a). Congress has placed special limitations on tax inquiries and examinations of churches, but not integrated auxiliaries, church-operated schools, or religious non-profit organizations. *See id.* § 7611.

Congress has used similar organizational distinctions in the realm of religious accommodations. Churches and qualified church-controlled organizations that object to paying Social Security and Medicare taxes for religious reasons may opt out of paying them by filing a form with the IRS, but other religious non-profit organizations may not. *See id.* § 3121(w).

2. Organizational Distinctions and Respecting the Religion Clauses

Distinctions based on organizational form enable the government to simultaneously respect both the Free Exercise Clause and Establishment Clause and permit the construction of accommodation schemes that pass constitutional muster. The Supreme Court has concluded

> [t]he general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 669 (1970); *see also Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 469 (N.Y. 2006) (observing the Plaintiffs' argument here "would call into question any limitations placed by the Legislature on the scope of any religious exemption—and thus would discourage the Legislature from creating any such exemptions at all," and thus concluding "[a] legislative decision not to extend an accommodation to all kinds of religious organizations does not violate the Establishment Clause"). We recognize the Government enjoys some discretion in fashioning religious accommodations, and believe doing so on the basis of organizational form comports with the Establishment Clause.

3. Organizational Distinctions Compatible with *Larson* and *Colorado Christian*

The Departments have offered the accommodation to Plaintiffs based on their organizational form. Plaintiffs rely on the decisions in *Larson v. Valente*, 456 U.S. 228 (1982), and *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), to support their Establishment Clause claim. But those cases do not hold that distinctions based on organizational type are impermissible.

Larson involved an Establishment Clause challenge to a Minnesota law that imposed registration and reporting requirements on religious organizations that received less than half of their contributions from members or affiliated organizations. *Larson*, 456 U.S. at 231. The legislature drew this distinction to discriminate against particular religions, which was evident in the legislative history. *Id.* at 253-54 ("[T]he history of [the challenged law] demonstrates that the provision was drafted with the explicit intention of including particular religious denominations and excluding others."). *Colorado Christian* differentiated institutions based on intrusive inquiries into their degree of religiosity. 534 F.3d 1259. In *Colorado Christian*, we concluded Colorado's exclusion of "pervasively sectarian" institutions from state scholarship programs violated the First Amendment "for two reasons: the program expressly discriminates among religions without constitutional justification, and its criteria for doing so involve unconstitutionally intrusive scrutiny of religious belief and practice." *Id.* at 1250. Neither of these two concerns in *Colorado Christian* is applicable here.

Larson and *Colorado Christian* prohibit preferences based on denomination (e.g., Catholic, Jewish, Islamic, etc.) and religiosity (e.g., pervasively sectarian, moderately sectarian, non-sectarian, etc.), but do not prohibit distinctions based on organizational type (e.g., church, non-profit, university, etc.). As *Larson* noted: "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." 456 U.S. at 244. In *Colorado Christian*, we determined that "defendants supply no reason to think that the government may discriminate between 'types of institution' on the basis of the nature of the religious practice these institutions are moved to engage in." 534 F.3d at 1259. As a result, Establishment Clause jurisprudence clearly indicates denominational preferences expressed by the government are subject to strict scrutiny. *See id.* Religiosity distinctions are subject to strict scrutiny as well because they involve the government in scrutinizing and making decisions based on particular expressions of religious belief. *See id.* at 1256 (invalidating Colorado law because it "expressly discriminates *among* religions, allowing aid to 'sectarian' but not 'pervasively sectarian' institutions, and it does so on the basis of criteria that entail intrusive governmental judgments regarding matters of religious belief and practice").

Plaintiffs cite no case holding that organizational distinctions, as opposed to those based on denomination or religiosity, run afoul of the Establishment Clause. Unlike *Awad v. Ziriax*, 670 F.3d 1111, 1128-29 (10th Cir. 2012), which concerned a state constitutional amendment forbidding courts

from considering or using Sharia law, evidence of animus or favoritism aimed at a denomination or degree of religiosity is absent here. "Because the law's distinction does not favor a certain denomination and does not cause excessive entanglement between government and religion, the framework does not violate the Establishment Clause." *Mich. Catholic Conf.*, 755 F.3d at 395; *see also Priests for Life*, 772 F.3d at 272-74.

Neither *Larson* nor *Colorado Christian* supports Plaintiffs' claim that distinctions between churches and other religious entities is impermissible. As we concluded in *Colorado Christian*, "if the State wishes to choose among otherwise eligible institutions, it must employ neutral, objective criteria rather than criteria that involve the evaluation of contested religious questions and practices." 534 F.3d at 1266. This is what the Departments have done with the accommodation scheme in compliance with the First Amendment's Establishment Clause.

4. Plaintiffs' Argument Based on the Departments' Rationale

Plaintiffs seize on the Departments' rationale for the distinction that religious non- profit organizations are more likely than churches to employ individuals who do not share their employers' beliefs but are nevertheless entitled to contraceptive coverage under the ACA. *See* 78 Fed. Reg. at 39,874 ("Houses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use

contraceptive services even if such services were covered under their plan."). Plaintiffs argue some denominations are less likely to carry out ministry functions through a church or integrated auxiliary than others, and that the workforces of some non-profit institutions may be more religiously homogenous than the workforces of some established churches.

The Departments' rationale may not be perfectly accurate, but it does not make the accommodation scheme unconstitutional. The class of religious non-profit organizations encompasses a vast array of religiously affiliated universities, hospitals, service providers, and charities, some of them employing thousands of people. Of course, some religious non-profit organizations may be more likely than some churches to employ co- religionists, but the Departments may reasonably recognize that, on the whole, churches are more likely to employ those who share their beliefs. *Priests for Life*, 772 F.3d at 272. The Departments originally exempted religious employers to "respect[] the unique relationship between a house of worship and its employees in ministerial positions." 76 Fed. Reg. at 46,623. We recognize that relationship between houses of worship and ministerial employees has been given special solicitude under the First Amendment. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 712-13 (2012). The Departments must avoid inquiries that involve them in "excessive entanglement" between religion and government, *see Colorado Christian*, 534 F.3d at 1261-62, and the general notion that houses of worship are more likely than religious non-profit organizations to employ

people of the same faith avoids impermissible scrutiny into the beliefs of religious entities and their employees.[54]

* * * *

Drawing a distinction between religious employers and religious non-profit organizations is a neutral and reasonable way for the Departments to pursue their legitimate goals in a constitutional manner. It gives special solicitude to churches to facilitate the liberties guaranteed by the Free Exercise Clause, and offers the accommodation scheme to relieve religious non-profit organizations of their obligation to provide contraceptive coverage under the Mandate without imposing a substantial burden on their religious exercise. The accommodation scheme does not violate the Establishment Clause.

C. Free Speech Clause

Plaintiffs finally contend the accommodation scheme violates the Free Speech Clause of the First Amendment, which states that "Congress shall make no law . . . abridging the freedom of speech," U.S. Const. amend. 1, by compelling them both to speak and remain silent, *see Riley v. Nat'l Fed'n of the Blind*

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[54] The original definition of "religious employer" required that the employer "primarily employs persons who share its religious tenets [and] primarily serves persons who share its religious tenets." 76 Fed. Reg. at 46,623. In response to religious entities that argued these requirements might involve excessive entanglement with religion, the Departments eliminated three of the four criteria and based the definition solely on organizational form. 78 Fed. Reg. at 8459. Plaintiffs now contend that simplified definition makes unfounded assumptions about who religious employers employ.

of N.C., Inc., 487 U.S. 781, 796-97 (1988). First, they argue that requiring them to sign and deliver the Form or the notification to HHS constitutes compelled speech. Second, they argue that prohibiting them from influencing their TPAs' provision of contraceptive coverage compels them to be silent. Both arguments fail.

1. Compelled Speech

The compelled speech claim fails. To the extent such a claim requires government interference with the plaintiff's own message, *see Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005) (stating a compelled speech claim arises when "an individual is obliged personally to express a message he disagrees with, imposed by the government"), the regulations do not require an organization seeking an accommodation to engage in speech it finds objectionable or would not otherwise express. The only act the accommodation scheme requires is for religious non-profit organizations with group health plans to sign and deliver the Form or notification expressing their religious objection to providing contraceptive coverage. The Sixth Circuit reasoned: "Even assuming the government is compelling this speech, it is not speech that the appellants disagree with and so cannot be the basis of a First Amendment claim." *Mich. Catholic Conf.*, 755 F.3d at 392; *see also Geneva Coll.*, 778 F.3d at 438-39 ("If anything, because the appellees specifically state on the self-certification form that they *object* on religious grounds to providing such coverage, it is a declaration that they will *not be complicit* in providing coverage."). Plaintiffs cannot point to speech they are required to

express and find objectionable.[55]

Indeed, Plaintiffs have not shown any likelihood that their sending in the Form or the notification would convey a message of support for contraception. Plaintiffs do not demonstrate their TPA, their health insurance issuer, or HHS—any one of which would be the sole recipient of the Form or notification—would view it as anything other than an objection to providing contraception. *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.* ("*FAIR*"), 547 U.S. 47 (2006), is instructive. In *FAIR*, a group of law schools challenged the Solomon Amendment, a federal statute that denied federal funding to universities that barred military recruiters from their campuses. At that time, the military did not permit gay, lesbian, and bisexual individuals to serve. The schools claimed a First Amendment compelled speech violation, arguing their compliance with the Solomon Amendment would signal their agreement with this policy. The Supreme Court rejected the argument, noting compliance did not signal agreement with the military's positions, and the Solomon Amendment did not prevent the schools from making their own position clear. *FAIR*, 547 U.S. at 65.

This point is even stronger in the instant case, where Plaintiffs would send the Form or notification to convey their *opposition* to providing contraception, and the ACA and implementing regulations do not

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[55] In *Axson-Flynn*, we recognized that a compelled speech claim may apply to non-ideological speech. We held a University of Utah theater student had alleged a compelled speech violation because she was required to utter certain swear words as part of a script and objected to doing so on religious grounds. 356 F.3d at 1284 n.4.

prevent them from expressing that opposition widely. Plaintiffs remain free to express opposition to contraception; "[n]othing in the[]final regulations prohibits an eligible organization from expressing its opposition to the use of contraceptives." 78 Fed. Reg. at 39,880 n.41. With the passage of the interim final rule, Plaintiffs also have the option to send a letter or email to HHS expressly objecting to any provision of contraception. They can fully explain their position in that notification. We are especially unconvinced that this option, freed from the text of the Form and permitting greater self-expression, forces Plaintiffs to engage in unwanted speech. Plaintiffs have not suggested the notification must be conveyed or communicated to any third parties or wider audience aside from the Departments themselves.

Even if Plaintiffs could identify speech they disagreed with—for example, identifying the name of their TPA or health insurance issuer—the argument that they are forced to send a message they do not wish to send is unavailing. The First Amendment does not—and cannot—protect organizations from having to make any and all statements "they wish to avoid." The cases cited by Plaintiffs are not about routine administrative burdens akin to complying with the accommodation scheme. These cases instead concern compelled ideological expression such as salutes to the flag, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943); messages on license plates, *Wooley v. Maynard*, 430 U.S. 705, 715 (1977), *Cressman v. Thompson*, 719 F.3d 1139, 1152 (10th Cir. 2013); wearing school slogans, *Frudden v. Pilling*, 742 F.3d 1199, 1203-04 (9th Cir. 2014); and taking a political stance on commercial sex, *Agency for Int'l Dev. v.*

Alliance for Open Soc'y Int'l, Inc., 133 S. Ct. 2321, 2331 (2013).

"Compelling an organization to send a form to a third party to claim eligibility for an exemption 'is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto "Live Free or Die," and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is.'" *Priests for Life*, 772 F.3d at 271 (quoting *FAIR*, 547 U.S. at 62). "That would be the equivalent of entitling a tax protester to refuse on First Amendment grounds to fill out a 1099 form and mail it to the Internal Revenue Service." *Wheaton College*, 2015 WL 3988356, at *8. None of the cases cited by Plaintiffs involve compliance with the administrative requirements of a government program, and especially not a government program designed to exempt and distance an organization from activity it finds objectionable.

We finally note that Plaintiffs' signature and delivery of the Form or notification to HHS is "plainly incidental to the . . . regulation of conduct" and thus is not protected speech. *FAIR*, 547 U.S. at 62. The act of signing and delivering the Form or notification to HHS is required to opt out of the Mandate. The Supreme Court has "rejected the view that 'conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea.' Instead, we have extended First Amendment protection only to conduct that is inherently expressive." *Id.* at 65-66 (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968)). The fact that Plaintiffs must complete the Form or notification to HHS to opt out of coverage does not render the act

inherently expressive. *See id.* at 62.

For the foregoing reasons, we reject Plaintiffs' compelled speech claim.

2. Compelled Silence

We further reject the claim that the accommodation scheme compels Plaintiffs' silence. Like the Sixth and Seventh Circuits, we note Plaintiffs have made only general claims objecting to the non-interference regulation and have failed to indicate how it precludes speech in which they wish to engage. *Mich. Catholic Conf.*, 755 F.3d at 392- 93; *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 561 (7th Cir. 2014), *vacated and remanded sub nom.*, *Univ. of Notre Dame v. Burwell*, 135 S. Ct. 1528 (2015). After the issuance of the interim final rule repealing the non-interference regulation, we do not believe this question is before us. We agree with the Government and the D.C. Circuit that the repeal of the non-interference rule renders Plaintiffs' claims regarding compelled silence moot. *See Priests for Life*, 772 F.3d at 242 n.8.

VII. CONCLUSION

We have reviewed the district courts' decisions to grant or deny a preliminary injunction to Plaintiffs in the three cases before us. Because we determine the ACA and its implementing regulations do not substantially burden Plaintiffs' religious exercise or violate the Plaintiffs' First Amendment rights, Plaintiffs have not established a likelihood of success on the merits or a likely threat of irreparable harm as required for a preliminary injunction. *See Hobby Lobby*, 723 F.3d at 1128.

We therefore affirm the district court's denial of a preliminary injunction in *Little Sisters*, 6 F. Supp. 3d 1225, and reverse the district courts' grant of a preliminary injunction in *Southern Nazarene*, 2013 WL 6804265, and *Reaching Souls*, 2013 WL 6804259.

EBSA FORM 700– CERTIFICATION

(revised August 2014)

This form may be used to certify that the health coverage established or maintained or arranged by the organization listed below qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing, pursuant to 26 CFR 54.9815-2713A, 29 CFR 2590.715-2713A, and 45 CFR 147.131. Alternatively, an eligible organization may also provide notice to the Secretary of Health and Human Services.

Please fill out this form completely. This form should be made available for examination upon request and maintained on file for at least 6 years following the end of the last applicable plan year.

Name of the objecting organization	
Name and title of the individual who is authorized to make, and makes, this certification on behalf	

of the organization	
Mailing and email addresses and phone number for the individual listed above	

I certify the organization is an eligible organization (as described in 26 CFR 54.9815-2713A(a), 29 CFR 2590.715-2713A(a); 45 CFR 147.131(b)) that has a religious objection to providing coverage for some or all of any contraceptive services that would otherwise be required to be covered.

Note: An organization that offers coverage through the same group health plan as a religious employer (as defined in 45 CFR 147.131(a)) and/or an eligible organization (as defined in 26 CFR 54.9815-2713A(a); 29 CFR 2590.715-2713A(a); 45 CFR 147.131(b)), and that is part of the same controlled group of corporations as, or under common control with, such employer and/or organization (within the meaning of section 52(a) or (b) of the Internal Revenue Code), is considered to meet the requirements of 26 CFR 54.9815-2713A(a)(3), 29 CFR 2590.715-2713A(a)(3), and 45 CFR 147.131(b)(3).

I declare that I have made this certification, and that, to the best of my knowledge and belief, it is true and correct. I also declare that this certification is complete.

_____ Signature of the individual listed above _____ Date
The organization or its plan using this form must provide a copy of this certification to the plan's health insurance issuer (for insured health plans) or a third party administrator (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement. <u>Notice to Third Party Administrators of Self-Insured Health Plans</u> In the case of a group health plan that provides benefits on a self-insured basis, the provision of this certification to a third party administrator for the plan that will process claims for contraceptive coverage required under 26 CFR 54.9815-2713(a)(1)(iv) or 29 CFR 2590.715-2713(a)(1)(iv) constitutes notice to the third party administrator that the eligible organization: (1) Will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and (2) The obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A. As an alternative to using this form, an eligible organization may provide notice to the Secretary of

Health and Human Services that the eligible organization has a religious objection to providing coverage for all or a subset of contraceptive services, pursuant to 26 CFR 54.9815-2713A(b)(1)(ii)(B) and (c)(1)(ii), 29 CFR 2590.715-2713A(b)(1)(ii)(B) and (c)(1)(ii), and 45 CFR 147.131(c)(1)(ii). A model notice is available at:

http://www.cms.gov/cciio/resources/Regulations-and-Guidance/index.html#Prevention.

This form or a notice to the Secretary is an instrument under which the plan is operated.

PRA Disclosure Statement

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 1210-0150. An organization that seeks to be recognized as an eligible organization that qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing may complete this self-certification form, or provide notice to the Secretary of Health and Human Services, in order to obtain or retain the benefit of the exemption from covering certain contraceptive services. The self-certification form or notice to the Secretary of Health and Human Services must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974, which generally requires records to be retained for six years. The time required to complete this information collection is estimated to average 50

minutes per response, including the time to review instructions, gather the necessary data, and complete and review the information collection. If you have comments concerning the accuracy of the time estimate(s) or suggestions for improving this form, please write to: U.S. Department of Labor, Employee Benefits Security Administration, Office of Policy and Research, 200 Constitution Avenue, N.W., Room N-5718, Washington, DC 20210 or email ebsa.opr@dol.gov and reference the OMB Control Number 1210-0150.

Little Sisters et al. v. Burwell, Nos. 13-1540, 14-6026, 14-6028

BALDOCK, Circuit Judge, dissenting in part.

Today the Court holds, among other things, that the ACA contraceptive Mandate's accommodation scheme does not substantially burden religious non-profits that object to facilitating contraceptive or abortifacient coverage because opting out does not cause, authorize, or otherwise facilitate such coverage.[1] The Court's opinion provides perhaps the most thorough explanation of the accommodation scheme's nuanced mechanics that I have yet read. And for argument's sake, I follow its holding as to the *insured* plaintiffs' and *Little Sisters* plaintiffs' RFRA claims.[2] But I cannot join the Court's holding as to the other *self-insured* plaintiffs' RFRA claims, as that holding contradicts the Court's own reasoning and thorough explanation of the accommodation scheme.

In reality, the accommodation scheme forces the self-insured plaintiffs to perform an act that causes their beneficiaries to receive religiously objected-to coverage. The fines the government uses to compel this act thus impose a substantial burden on the self-insured plaintiffs' religious exercise. Moreover, less restrictive means exist to achieve the government's

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[1] For consistency, I adopt the Court's glossary.

[2] As I explain below, the *Little Sisters* plaintiffs, though self-insured, have not shown that their opting out will necessarily cause their plan participants and beneficiaries to receive contraceptive coverage. Accordingly, my use of the term "self-insured plaintiffs" does not refer to the Little Sisters unless otherwise stated.

contraceptive coverage goals here. I must therefore dissent in part.

I. WHEN IS A BURDEN ON RELIGIOUS EXERCISE "SUBSTANTIAL?"

The first step of a RFRA claim requires plaintiffs to show (1) that the federal government has imposed a substantial burden on a (2) sincere (3) exercise of religion. *See* 42 U.S.C. § 2000bb-1(a). The unique threshold question we and so many other courts are currently grappling with, however, is how to determine whether a substantial burden exists where a law compels religious adherents to perform an act they sincerely oppose when this opposition might be based on a faulty understanding of the law. *See, e.g.*, *E. Tex. Baptist Univ. v. Burwell*, 2015 WL 3852811, at *3 (5th Cir. June 22, 2015).

Several learned judges have argued compellingly that, under *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the amount of coercion the government uses to force a religious adherent to perform an act she sincerely believes is inconsistent with her understanding of her religion's requirements is the only consideration relevant to whether a burden is "substantial" under RFRA. *See, e.g.*, *Priests For Life v. U.S. Dep't of Health & Human Servs.*, No. 13-5368, slip op. at 17–22 (D.C. Cir. May 20, 2015) (Brown, J., dissenting from the denial of rehearing en banc); *id.* at 35 (Kavanaugh, J., dissenting from the denial of rehearing en banc); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 628 (7th Cir. 2015) (Flaum, J., dissenting); *Eternal Word Television Network, Inc. v. Sec'y, Dep't of Health & Human Servs.*, 756 F.3d 1339, 1340 (11th Cir. 2014) (Pryor, J. specially concurring);

see also Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1137 (10th Cir. 2013) ("Our only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief."); *cf. E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2031–33 (2015) (analyzing a plaintiff's exercise as a "religious practice" under Title VII where the act was motivated by "her understanding of her religion's requirements").

These judges assert that whether religious objectors properly understand the legal significance of the compelled act has no bearing on the substantial burden analysis. *E.g. Priests For Life.*, No. 13-5368, slip op. at 35 (Kavanaugh, J., dissenting) ("But what if the religious organizations are misguided in thinking that this scheme . . . makes them complicit in facilitating contraception or abortion? That is not our call to make under the first prong of RFRA."). And *Hobby Lobby* supports this position well, as questioning a religious adherent's understanding of the significance of a compelled action comes dangerously close to questioning "whether the religious belief asserted in a RFRA case is reasonable"—a "question that the federal courts have no business addressing." *Hobby Lobby*, 134 S. Ct. at 2778.

Under this understanding of RFRA, the accommodation scheme substantially burdens any religious non-profit that objects to performing an act that would cause or otherwise make it complicit in providing contraceptive coverage simply because the scheme uses substantial fines to compel an act that the non-profit sincerely believes would have that

effect. The actual legal significance of the compelled act is irrelevant to the substantial burden analysis. And because the government has conceded (2) the sincerity of (3) the religious exercise at issue, the only issue left to address is whether the government has shown that the accommodation scheme survives strict scrutiny. The judges who take this position, so far, all agree that the government has not made this showing. *Priests For Life*. No. 13-5368, slip op. at 22–25 (Brown, J., dissenting); *id.* at 46–51 (Kavanaugh, J., dissenting); *Notre Dame*, 786 F.3d at 629–30 (Flaum, J., dissenting); *Eternal Word Television Network*, 756 F.3d at 1348–49 (Pryor, J. specially concurring).

Notwithstanding the strength of those positions, I will proceed under the following assumptions to highlight an even deeper problem lurking within the self-insured accommodation scheme: First, I will assume that whether a burden on religious exercise is "substantial" turns not only on the amount of coercion the government uses to compel an act (no one disputes the substantiality of the fines at issue here), but also on "how the law or policy being challenged actually operates and affects religious exercise." Slip Op. at 39. Second, I will assume this Court may tell a religious adherent she does not face a substantial burden on her religious exercise if her understanding of the law is flawed. Third, I will assume that any burden the accommodation scheme imposes on Plaintiffs— who object to performing any act that would cause or otherwise make them complicit in providing various forms of contraceptive coverage—cannot be substantial unless they show, for example, how their compelled act causes that coverage. *See* Slip Op. at 45–66.

The Court tells Plaintiffs they cannot make this showing "because opting out would not trigger, incentivize, or otherwise cause the provision of contraceptive coverage." Slip Op. at 65. If showing this causation is a prerequisite to establishing a substantial burden, the Court properly rejects the *insured* plaintiffs' RFRA claim, as their action or inaction will not affect whether their plan beneficiaries receive objected-to coverage. But the *self-insured* plaintiffs' inaction will prevent their plan beneficiaries from receiving the coverage. If their beneficiaries receive this coverage, it is only because the self-insured plaintiffs, by opting out, *caused that effect*. Thus, the self- insured plaintiffs have shown how their opting out would cause the provision and receipt of objected-to coverage and established a substantial burden on their religious exercise.

I. THE CRITICAL DISTINCTION IN THIS CASE

I have nothing to add to the Court's summary of the background in these cases, and very little to add to its explanation of the detailed mechanics of the ACA accommodation scheme. But a critical distinction within scheme bears repeating. Under the ACA accommodation scheme, in the *insured* health plan context, "a health insurance issuer . . . would be obligated to provide contraceptive coverage under the ACA whether or not [the insured non-profit] delivered the Form or notification to HHS." Slip Op. at 48 n.28 (citing 42 U.S.C. § 300gg-13). But in the *self-insured* context, a TPA would be "*authorized* and obligated to provide the coverage . . . *only if* the religious non-profit . . . opts out." Slip Op at 49 (emphases added); *see also* 26 C.F.R. § 54.9815-2713AT(b)(2); 29 C.F.R. §

2590.715-2713A(b)(2).

The Fifth, Sixth, and Seventh Circuits failed to recognize this distinction. *See E. Tex. Baptist*, 2015 WL 3852811, at *5; *Notre Dame*, 789 F.3d at 614; *Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 755 F.3d 372, 387 (6th Cir. 2014) *cert. granted, judgment vacated* 135 S. Ct. 1914 (2015). The Third and D.C. Circuits failed to appreciate its significance. *See Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 438 (3d Cir. 2015); *Priests For Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 254–56 (D.C. Cir. 2014). This Court considers the distinction "unremarkable." Slip Op. at 49. I disagree. The distinction makes a difference, and juxtaposing the insured plaintiffs and self-insured plaintiffs forces that difference into bold relief.

A. The Insured Plaintiffs

Assuming causation is key, I agree the accommodation scheme does not substantially burden the *insured* plaintiffs' religious exercise. As the Court explains, even total inaction on the part of an insured non-profit still results in its plan participants and beneficiaries receiving the coverage to which they are entitled under the ACA because the government has independently obligated a third party (insurance issuers) to provide it.[3] *See* Slip Op. at 46–47. Opting

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[3] Even the government's proffered fourth option—declining to sponsor a group health plan—would not interfere with contraceptive coverage for the insured plaintiffs' plan beneficiaries. Without an employer-sponsored plan, these beneficiaries would have to find other health insurance. *See Nat'l*

out in the insured context does not cause the receipt of contraceptive coverage; rather, it merely absolves the eligible insured non- profit of any responsibility for the contraceptive coverage its plan participants and beneficiaries will receive *whether it opts out or not*. Thus, assuming Plaintiffs must show how opting out causes coverage, the accommodation scheme does not substantially burden the *insured* plaintiffs' exercise of religion. The insured accommodation is more akin to traditional conscientious objector schemes: the government can and will conscript the actors it needs to achieve its goals whether objectors opt out or not.

The same cannot be said of the self-insured plaintiffs, however.

B. The Self-Insured Plaintiffs

Unlike the *insured* plaintiffs, the ACA leaves the *self-insured* plaintiffs in a position where, by refusing to opt out, they can prevent their plan beneficiaries from receiving the objected-to coverage the beneficiaries are entitled to and would otherwise receive under the ACA. In other words, their plan participants and beneficiaries will receive the coverage *only if* they opt out as the government commands. This makes their opting out a but-for cause of the receipt of the coverage.

The Court views this ability to prevent contraceptive coverage by inaction as nothing more than the ability to disobey the law. *See* Slip Op. at 54–

Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2664 (2012) (Scalia, J., dissenting). And that insurance would likely cover contraceptives. *See* 42 U.S.C. § 300gg-13

55 & n.35. But that is the same limited ability the plaintiffs in *Hobby Lobby* possessed, and it goes to the heart of the substantial burden the self-insured plaintiffs face here. "In *Hobby Lobby*, the plaintiff[s] . . . could choose only between (1) complying with the ACA by providing the coverage or (2) not complying and paying significant penalties." Slip Op. at 3 (citing *Hobby Lobby*, 134 S. Ct. at 2759–60). Similarly, these self-insured plaintiffs must choose between (1) complying with the ACA by taking an action that ultimately causes their beneficiaries to receive this coverage or (2) not complying and paying significant penalties. This is a Hobson's choice, which we have long held imposes a substantial burden under RFRA. *See Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010) ("We conclude that a religious exercise is substantially burdened under [RFRA] 42 U.S.C. § 2000cc–1(a) when a government . . . presents the plaintiff with a Hobson's choice—an illusory choice where the only realistically possible course of action trenches on an adherent's sincerely held religious belief."); *Hobby Lobby*, 723 F.3d at 1141 (10th Cir. 2013) (explaining that the choice between compromising religious beliefs and paying fines under the ACA "is precisely the sort of Hobson's choice described in *Abdulhaseeb*").

1. The Obvious Causal Connection

If causation is key to showing a substantial burden, *see* Slip Op. at 32–33, 45–66, the self-insured plaintiffs have surely shown that burden. Certainly, a shifting legal responsibility alone may not necessarily create a causal relationship. But here, the self-insured plaintiffs' opt out causes the coverage because (1) the government cannot force plaintiffs themselves

to provide the coverage, *Hobby Lobby*, 134 S. Ct. at 2785, and (2) the government cannot shift the ability (let alone the responsibility) to provide the coverage to non-objectors unless the self-insured plaintiffs opt out. *See* 29 C.F.R. § 2590.715-2713A(b)(2); Slip Op. at 48–49. Opting out is thus the only way their plan participants and beneficiaries may receive the coverage.

Put another way, if the self-insured plaintiffs do not opt out, who will provide the coverage for their plan participants and beneficiaries? The answer: no one. The self- insured plaintiffs cannot do so per their faith; the TPAs cannot do so per the law. Thus, the self-insured accommodation renders any duty to provide, and any entitlement to receive, contraceptive coverage wholly unenforceable and thus illusory—unless and until the self-insured plaintiffs opt out. *Cf. Pennington v. Northrop Grumman Space & Mission Sys. Corp.*, 269 F. App'x 812, 819 (10th Cir. 2008) (unpublished) ("[W]hen a promise, in reality, promises nothing—it is illusory." (Internal marks and citation omitted)).

To fully understand why no one can or will provide this objected-to coverage unless the self-insured plaintiffs perform a compelled act, one must view the ACA Mandate and accommodation scheme in light of *Hobby Lobby*. *Hobby Lobby* clearly holds forcing religious employers to provide objected-to contraceptive coverage violates RFRA. 134 S. Ct. at 2785. So, if any entity is to provide the coverage, it must be a third party. The *insured* accommodation independently conscripts third parties to provide the coverage. But as this Court points out, the *self-insured* accommodation was drafted such that no

third party can provide the coverage in the self-insured context unless and until the objecting religious employer opts out. Slip Op. at 48–49; *see also Eternal Word Television Network*, 756 F.3d at 1347 (Pryor, J., specially concurring) (explaining that, without the Form or letter, a TPA "has no legal authority to step into the shoes of the [non-profit] and provide contraceptive coverage to the employees and beneficiaries of the [non-profit]"). As such, a third party's legal authority (*i.e.* permission) to provide the coverage is wholly dependent upon (*i.e.* caused by) the self-insured non-profit opting out.

The Court believes we should focus on the fact that the ACA "entitle[s] plan participants and beneficiaries to coverage whether or not the plaintiffs opt out" and imposes a duty on "either the religious non-profit organization or the TPA" to provide that coverage. Slip Op. at 33, 57. But this reasoning (1) fails to consider the ACA Mandate in light of the limitations *Hobby Lobby* already imposed, and (2) confuses legal concepts (duty and entitlement) with real-world effects (provision and receipt).

First, the Court's focus on the ACA's requirement that "either the religious non- profit organization or the TPA" provide the coverage, Slip Op. at 57, ignores the fact that the government cannot require the religious non-profit to provide the coverage under *Hobby Lobby*. By ignoring the limitation *Hobby Lobby* imposes on the government, the Court simultaneously acknowledges that "opting out is necessarily a but-for cause of someone else—the TPA—providing contraceptive coverage," Slip Op. at 56, and nevertheless rejects the self-insured plaintiffs' RFRA claims for lack of causation. Slip Op. at 64–65. But

again, *Hobby Lobby* forbids the government from placing this requirement on the non-profits themselves. So if opting out is necessarily a but-for cause of someone else providing the coverage, it is necessarily a but-for cause of anyone providing the coverage *at all*. Essentially, the Court concedes but-for cause and then turns around and denies the existence of any causation. What?

Second, the Court asserts that the self-insured plaintiffs' opt out will not cause the actual provision and receipt of objected-to coverage because the ACA creates an independent, albeit illusory, duty and entitlement related to that coverage. True, opting out does not cause *entitlement* to contraceptive coverage—the ACA entitles all health plan beneficiaries to contraceptive coverage. But these beneficiaries will not *receive* that coverage unless the self-insured plaintiffs do something to cause its provision from a third party. In other words, the ACA may independently say "someone" has a *duty* to provide contraceptive coverage, *see* 29 C.F.R. § 2590.715–2713, but no one can or will honor that duty and *provide* the coverage unless the self-insured plaintiffs opt out. No self-insured plaintiff will honor it because the government cannot force them to under *Hobby Lobby*, and no third party can honor it because no third party has authority to do so without an opt out. Based on this error, the Court concludes that "federal law, not the actions of the religious objector, ensures that plan participants and beneficiaries will *receive* contraceptive coverage." Slip Op. at 52 (emphasis added). But that is simply wrong. As explained above, federal law alone does not ensure receipt of the coverage from the self-insured plaintiffs; and it does

not even allow, let alone ensure, receipt of that coverage from a third party unless the self-insured plaintiffs opt out. Rather, federal law, *only in conjunction with the self-insured plaintiffs' opt out*, allows plan participants and beneficiaries to receive contraceptive coverage.[4]

These errors, taken together, cause the Court to reject a straw man rather than the self-insured plaintiffs' RFRA claims. The self-insured plaintiffs do not claim a RFRA violation based on the fact that the ACA created an entitlement to contraceptive coverage; they object to the causal role they must play in providing that coverage.[5]

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[4] Even with the opt-out, federal law does not always *ensure* receipt of the coverage. For example, the Court asserts "the ACA ensures plan participants and beneficiaries will *receive* contraceptive coverage" but simultaneously contradicts itself by acknowledging that TPAs for self-insured church plans may in fact decline to *provide* that coverage, in which case "plan participants and beneficiaries would not get the coverage to which they are otherwise entitled." Slip Op. at 61 & n.41 (emphases added).

The Court's attempt to paint these contradictory positions as consistent suffers from the same logical flaw highlighted above; that is, it confuses the actual *provision* and *receipt* of coverage with a concededly unenforceable *entitlement* and *duty* to provide it. If the law cannot force an unwilling TPA to provide contraceptive coverage, the TPA will not provide it, and the plan beneficiaries will not receive it. *Cf. Mach Mining, LLC v. E.E.O.C.*, 135 S. Ct. 1645, 1652–53 (2015) (acknowledging that even the government may violate the law, "especially so when [it faces] no consequence"). Thus, the existence of an unenforceable duty to provide contraceptive coverage does not ensure receipt, as this Court seems to believe.

[5] The Court also asserts that religious non-profits "cannot preclude the government from requiring others to provide the

A proper accommodation may relieve otherwise substantial burdens on religious exercise, but this accommodation fails to do so, at least in the self-insured context. And to be sure, "[a] burden does not rise to the level of being substantial when it places an inconsequential or de minimis burden on an adherent's religious exercise." Slip Op. at 41 (quoting *Priests for Life*, 772 F.3d at 246). But here, the accommodation scheme foists upon the self-insured plaintiffs a choice with dire consequences. Either (1) they refuse to act, which would avoid causing their plan beneficiaries to receive objected-to coverage but trigger crippling fines for violating the law or (2) they act, which would cause the receipt of this coverage and violate their faith. If "the purpose of religious accommodation" was to permit religious objectors "to avoid a religious burden and to comply with the law," *see* Slip Op. at 55, it fails to achieve that purpose. Rather, the accommodation foists upon the self-insured plaintiffs a Hobson's choice and thus a substantial burden on their exercise of religion.

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legally required coverage in its stead," Slip Op. at 51–52, and "cannot hamstring government efforts to ensure that plan participants and beneficiaries receive the coverage to which they are entitled under the ACA," Slip Op. at 71. I agree that this *should not* be the case but, unfortunately, the government drafted the self-insured accommodation such that the self-insured plaintiffs *can*, by inaction, do exactly that. As explained above, that is precisely why their opting out causes the receipt of objected-to coverage.

Moreover, to the extent this language connotes dissatisfaction with the problems created by the self-insured accommodation, such dissatisfaction is irrelevant to whether the law imposes a substantial burden under RFRA. Our job is not to "add words to the law to produce what is thought to be a desirable result." *Abercrombie & Fitch*, 135 S. Ct. at 2033.

Abdulhaseeb, 600 F.3d at 1315.

2. This is Not a Conscientious Objector Accommodation Scheme

The Court believes this accommodation scheme akin to the conscientious objector schemes used for military conscription. *See* Slip Op. at 52 n.33. Not so. The accommodation scheme may *function* like a conscientious objector scheme in some regards, but it ultimately forces objectors to play a very different and causal role.

Military conscription law generally requires male citizens to register for the draft and allows the President to draft a certain number of men from that pool of candidates into active duty in the Armed Forces.[6] *See, e.g.*, *Arver v. United States*, 245 U.S. 366, 375–76 (1918) (allowing the President to draft up to two groups of 500,000 men). After registering, conscientious objectors can opt out of serving in combat. 50 App. U.S.C. § 456(j). But they cannot reduce the number of men the President ultimately drafts. Whether objectors lawfully register and opt out, or register and then choose unlawfully to avoid induction, or even choose unlawfully not to register at all, the President can and will draft the same number of men needed for war. *See* LAWRENCE M. BASKIR & WILLIAM A. STRAUSS, CHANCE AND CIRCUMSTANCE: THE DRAFT, THE WAR, AND THE VIETNAM GENERATION 14–28 (1978) (explaining that the government's Vietnam draft

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[6] Currently, "every male citizen of the United States . . . between the ages of eighteen and twenty-six" must register in order to facilitate any eventual conscription into the Armed Forces. 50 App. U.S.C. § 453(a).

policies "did not care who was drafted as long as enough people were drafted").

Indeed, the Court's reliance on *Sheridan v. United States*, 483 F.2d 169 (8th Cir. 1973), highlights this difference. In *Sheridan*, the defendant registered for the draft but did not lawfully opt out. Instead, he simply refused to be inducted. *Id.* at 170. But the result under conscription law was the same: "another person [was] called in his place." *Id.* at 174. In other words, like the *insured* plaintiffs, no matter what conscientious objectors do or refuse to do, the government can and will achieve its military draft goals.

The opposite result occurs under the self-insured accommodation scheme. If a *self-insured* plaintiff simply refuses to provide coverage and does not opt out, the government cannot call a third party in its place. The accommodation scheme thus places the self-insured plaintiffs in a very different position vis-à-vis helping the government achieve its religiously objectionable goals. Conscientious objectors cannot prevent the government from conscripting their replacements; but the self-insured plaintiffs can *completely* prevent the government from even authorizing their TPAs to provide objected-to coverage. Conscientious objectors also need not identify a related third party to serve in their stead; but the self-insured plaintiffs must identify a related third party through a form or letter. And this form or letter is the *only means* by which the government can authorize that third party to serve in their stead. Under conscientious objector schemes, the government may independently draft non-objecting Americans into combat to further its war efforts;

conscientious objectors have no power to stop it. But under the self-insured accommodation scheme the government needs the self-insured plaintiffs to commit an act to further its contraceptive coverage efforts; their beneficiaries will not receive this coverage unless they commit that act and cause that result. Such a conscientious objector scheme—where the government could draft a replacement soldier *only if* the initial conscientious objector opted out *and* identified a previously ineligible relative to serve in his stead—would be immensely problematic, to say the least.[7]

In relying on conscientious objector schemes the Court commits the same error it levies against this dissent: it fails to appreciate the broader structures of both the accommodation and conscientious objector schemes. In comparing the two schemes, the Court

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[7] The Court attempts to counter this point by referencing the Enrollment Act of 1863, which "permitted a draftee to avoid service only by either providing a substitute or paying $300." Slip Op. at 52 n.33 (quoting Act of March 3, 1863, ch. 75, § 13, 12 Stat. 731, 733 (1863)). But this act was a short-lived experiment that did not even survive to the end of that war. Moreover, resentment over the Enrollment Act and its opt-out provision triggered the "New York City draft riot, the largest [and deadliest] civil insurrection in American history apart from the South's rebellion itself." ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877 at 32 (1988). "No case questioning the Civil War draft was heard by the Supreme Court, but it is known that Chief Justice Roger Taney prepared a rough outline of an opinion declaring the act unconstitutional." Leon Friedman, *Conscription and the Constitution*, 67 MICH. L. REV. 1493, 1546 (1969). Indeed, one eminent historian called the substitution provision a "grotesque monstrosit[y]" and stated "[t]he government could hardly have devised a worse law." BRUCE CATTON, THE CIVIL WAR 208 (1987). I would call that problematic.

focuses only on the acts the objector must perform to opt out, and what happens if the objector performs those acts. The comparison totally ignores the broader and more critical difference between the two schemes: what happens if the objector refuses to perform those acts? Conscription law requires that "someone" go to war, and in the end "someone" *will* go to war. The law is such that the government can and will shift this legal duty to a non-objector regardless of the objector's action or inaction. Conversely, the ACA says "someone" must provide contraceptive coverage, but the self-insured accommodation was drafted such that if the self-insured plaintiffs choose to do nothing rather than opt out, no one will actually provide that coverage. Again, the government cannot force the plaintiffs to provide the coverage, and it cannot shift the duty to provide the coverage unless the self-insured plaintiffs choose to opt out. If the government could independently shift this duty (as conscription law allows) or eliminate the need to shift the duty at all (as the insured accommodation does) that might eliminate the causal role the self-insured plaintiffs currently face. But presently, the law forces the self-insured plaintiffs into gatekeeping positions and then uses fines to force them to open the gates.

3. The Supreme Court's *Little Sisters* and *Wheaton College* Orders

The Court also believes the accommodation scheme does not impose a substantial burden on self-insured non-profits because the government's new alternative notice accommodation—which forces an objecting non-profit to write a letter to HHS opting out and identifying its TPAs and/or health insurance issuers—is essentially akin to the Supreme Court's

injunctions pending appeal in *Little Sisters of the Poor Home for the Aged, Denver, Colorado v. Sebelius*, 134 S. Ct. 1022 (2014), *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014), and most recently *Zubik v. Burwell*, Nos. 14A1065, 14- 1418, 2015 WL 3947586, at *1 (U.S. June 29, 2015). *See* Slip Op. at 42 n.25, 59 n.39. But the Court's reliance on these interim orders appears to be based on two flawed assumptions: (1) that the notices required by these orders were sufficient to authorize a TPA to provide coverage it could not provide before, and (2) even assuming this dubious interpretation of the orders, that they approved of compelling religious non-profits to play this causal role under RFRA's first step (no substantial burden) as opposed to approving of such compulsion only where it satisfies RFRA's second step (strict scrutiny).

As to the first assumption, the *Little Sisters* order nowhere contemplates allowing the government to use the Little Sisters' interim written notice to facilitate coverage by alternative means. And the *Wheaton College* order did not allow the government to rely on Wheaton's interim written notice, either. Rather, it allowed the government to rely on preexisting knowledge that Wheaton qualified for exemption and would not provide certain contraceptive coverage. *See Wheaton Coll.*, 134 S. Ct. at 2807 ("But [Wheaton] *has already notified the Government*—without using EBSA Form 700—that it meets the requirements for exemption from the contraceptive coverage requirement on religious grounds. Nothing in this order precludes the Government from relying on *this notice*, to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage under the Act." (emphases added)). Moreover, as

Justice Sotomayor's dissent in *Wheaton College* shows, the written notices required in *Wheaton College*, *Little Sisters*, and *Zubik* were insufficient to authorize TPA coverage under the then-effective accommodation, and may remain insufficient even under the new alternative accommodation. *See Wheaton Coll.*, 134 S. Ct. at 2814 n.6 (Sotomayor, J., dissenting).[8]

To the extent *Wheaton College* allows the government to rely on its knowledge of Wheaton's objection, this merely tracks the Supreme Court's decision in *Bowen v. Roy*, where the Court rejected a Free Exercise challenge to the government's *use* of a social security number it *already possessed* and concluded that the First Amendment does not "require the government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." 476 U.S. at 693, 699 (1986). But importantly:

> a majority of justices [in *Roy*] indicated that the requirement that applicants *furnish* a social security number was a different matter. Five justices either concluded or strongly suggested that the government could not require an

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[8] That is, even under the new alternative notice scheme, the "information necessary to verify applicants' eligibility under 26 CFR §54.9815-2713A(a)," *see Zubik*, 2015 WL 3947586, at *1, does not contain all the information required by the regulations and thus might not qualify as a valid opt out sufficient to trigger TPA coverage, *see* 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B) (requiring the self-insured organization to provide, among other things "the plan name and type . . . and the name and contact information for any of the plan's third party administrators"); *Wheaton Coll.*, 134 S. Ct. at 2814 n.6 (Sotomayor, J., dissenting).

> applicant to provide the number on a benefits application if the applicant had a sincere religious objection to doing so.

Univ. of Notre Dame v. Sebelius, 743 F.3d 547, 567 (7th Cir. 2014) (Flaum, J., dissenting) (emphasis in original), *cert. granted, judgment vacated sub nom. Univ. of Notre Dame v. Burwell*, 135 S. Ct. 1528 (2015); *see Roy*, 476 U.S. at 714–16 (Blackmun, J., concurring in part), 732 (O'Connor, J., concurring in part and dissenting in part) ("The rise of the welfare state was not the fall of the Free Exercise Clause."), 733 (White, J., dissenting).

Moreover, the Court may well have expressly allowed for this reliance in *Wheaton College* because, unlike the Little Sisters, Wheaton provides insurance through both self-insured plans *and* insured plans subject to the Mandate. *See Wheaton Coll. v. Burwell*, 50 F. Supp. 3d 939, 944 (N.D. Ill. 2014) (Wheaton "offers its health insurance pursuant to six plans: two insured HMO plans, a [grandfathered] PPO plan, two self-funded prescription drug plans, and an insured student health plan." (footnote omitted)). Thus, unlike the wholly self-insured Little Sisters, the government might independently ensure that an issuer from at least one of these insured health plans provides full contraceptive coverage to at least some of Wheaton's various plan beneficiaries under the current ACA regime without forcing Wheaton to play a causal role in the receipt of that coverage.

Thus, the *Little Sisters*, *Wheaton College*, and *Zubik* orders allow religious non-profits to simply notify the government that they qualify for exemption and will not provide contraceptive coverage. The

government may use its knowledge of these objections when choosing between *independently* available alternative means to ensure coverage is provided (as the conscientious objector and *insured* schemes do). But these orders do not allow the government to compel religious non-profits to furnish the document that is essential to cause their plan beneficiaries to receive objected-to coverage.

And yet, suppose these orders could be read to say that the written notices they required were legally sufficient to authorize a previously ineligible TPA to provide objected-to coverage. Under that dubious interpretation, the orders would indeed force self-insured religious objectors to perform an act that causes the ultimate provision of the coverage, as they would make the provision of the coverage wholly contingent upon the religious objectors' acts of providing HHS with that notice. For all the reasons discussed above, that interpretation of the orders would impose a substantial burden on the self-insured plaintiffs' exercise of religion.

So, turning to the Court's second assumption, even under its dubious interpretation of the orders, the orders nowhere say that forcing religious non-profits to play this sort of causal role avoids imposing a substantial burden on their religious exercise. Instead, assuming the Court's interpretation of these orders is correct, these orders would impose a substantial burden under RFRA's first step and therefore must comply with RFRA's second step (strict scrutiny). Indeed, Judge Kavanaugh has compellingly argued that these orders simply set forth a less restrictive means of achieving the government's compelling interest in facilitating access to

contraceptive coverage. *See Priests For Life*, No. 13-5368, slip op. at 46–51 (Kavanaugh, J., dissenting). These orders do not require religious non-profits to identify related third parties for the government to authorize and possibly conscript in their stead. Rather, they only require the non-profits to inform HHS that they qualify for exemption and will not provide objected-to coverage. As discussed above regarding conscientious objector schemes, a significant difference exists between asking a religious objector to say simply "no" and compelling that objector to identify a related entity to serve as a scapegoat where no one else can.[9]

4. ERISA-Bound Plans v. ERISA-Exempt Church Plans

The burden the self-insured plaintiffs face is most salient with regards to Southern Nazarene, whose TPA is subject to ERISA enforcement and therefore will be not only authorized but also required to provide contraceptives to the participants and beneficiaries of Southern Nazarene's self-insured plan *only if* Southern Nazarene opts out. *See* 29 C.F.R. § 2590.715-2713A(b)(2). Southern Nazarene's opt out will thus clearly cause someone to provide contraceptive coverage where no one would or could before.

But the lack of an enforcement mechanism as to ERISA-exempt church plans does not itself remove the causal role and substantial burden that the

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[9] Moreover, this less restrictive means of achieving the same goal necessarily dooms the current self-insured accommodation scheme under strict scrutiny. *See infra* Part III.

accommodation scheme foists upon the church-plan plaintiffs. For example, the Guidestone Plan is an ERISA- exempt church plan, but at least one of its TPAs, Highmark, has indicated it will provide full contraceptive coverage for those self-insured organizations that use the Guidestone Plan and validly opt out. And plaintiffs Reaching Souls, Truett-McConnell College, and Mid-America Christian University are all self-insured plaintiffs that use the Guidestone Plan. Slip Op. at 21; SN Supp. Br. II at 9 n.2. So even though their opting out might not trigger an *enforceable* duty to provide objected-to coverage, these church plan plaintiffs have established that their opting out will actually cause Highmark to provide the coverage—coverage it cannot provide unless they opt out.

True, given the repeal of the accommodation scheme's non-interference provision, church plans like the Guidestone Plan might try to fire TPAs like Highmark and replace them with TPAs that promise not to provide coverage for objected-to contraceptives, and those plaintiffs that use the Guidestone Plan might be able to fire Guidestone if it refuses to do so. *See* RS Oral at 12:57–13:10. Thus, by economic coercion, these plaintiffs might be able to ultimately stop the provision of the coverage they were initially forced to cause. But, the government maintains that "such conduct is generally unlawful and is prohibited under . . . state and federal laws." *See* 79 Fed. Reg. at 51,095. And none of this changes the present fact that if plaintiffs who use the Guidestone Plan opt out, they will cause Highmark to perform a religiously objected-to act on their behalf where Highmark previously could not do so. Thus, those self-insured plaintiffs that

use the Guidestone Plan have shown "presently threatened injuries" warranting injunctive relief. *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931).

The *Little Sisters* plaintiffs, on the other hand, have not established this causal connection. The Little Sisters' primary TPA, Brothers Services, is not bound by ERISA and has promised not to provide contraceptive coverage even if Little Sisters opts out. Little Sisters asserts that Brothers Trust also uses other TPAs who might choose to provide contraceptive coverage if they opt out, but they have not sufficiently developed this theory to bear the burden of establishing that their opting out will presently cause someone to provide contraceptive coverage to their plan beneficiaries.

The Court also suggests self-insured non-profits "could relieve themselves of any lingering doubts they may have about causation by [1] employing an insured plan, [2] employing a self-insured church plan where the Departments lack authority to enforce the Mandate against their TPA, or [3] administering the self-insured plan on their own in- house without using a TPA." Slip Op. at 52 n.32. But none of these options alleviate the substantial burden the accommodation scheme imposes. First, choosing to switch from a self-insured plan, where no coverage can be provided without an opt out, to an insured plan, where coverage will be provided by a third party, would simply mean choosing to cause that coverage by switching plans rather than opting out. Second, as discussed above, even in the church plan context, opting out may still cause a TPA to provide the coverage. Third, no plaintiff in this case administers its plan in-house. So

to the extent the Court opines on the legal effect the ACA Mandate might have on a plan not at issue in this case, the Court impermissibly exceeds its jurisdiction by "advising what the law would be upon a hypothetical state of facts." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990) (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)).

Given that we do not have jurisdiction to pass on this hypothetical, the self-insured plaintiffs should not have to rebut it to prove a present substantial burden under RFRA. But, because the Court goes there, administering a self-insured plan in-house without a TPA can be prohibitively complex, limit options for managing care, and create legal pitfalls that many non-profits simply cannot afford to handle. *See* Thomas R. McLean & Edward P. Richards, *Health Care's "Thirty Years War": The Origins and Dissolution of Managed Care*, 60 N.Y.U. ANN. SURV. AM. L. 283, 313 (2004); *see generally* Rhonda D. Orin and Daniel J. Healy, *Self-Administering, Insuring and Funding Benefit Plans*, 197–213 in HUMAN RESOURCES (Thompson 2007 Summer Edition).

C. Summing Up the Substantial Burden On the Self-Insured Plaintiffs

The Court concludes that the Plaintiffs' causation arguments fail because "opting out would not trigger, incentivize, or otherwise cause the provision of contraceptive coverage." Slip Op. at 65–66. This conclusion is correct in the *insured* context. But the *self-insured* plaintiffs, with the exception of Little Sisters, have shown exactly how their act of opting out will cause someone to provide contraceptive coverage where their refusal to act would prevent that result.

Unfortunately, the Court fails to see this obvious causal relationship because it ignores the clear holding of *Hobby Lobby* and fails to comprehend the difference between unenforceable entitlement and actual receipt. The government has left self-insured plaintiffs in a position where they must decide whether their beneficiaries will actually *receive* objected-to contraceptive coverage. The accommodation does not absolve these plaintiffs of this responsibility. Instead, it forces them to either (1) violate their sincere religious beliefs by performing an action that will cause their beneficiaries to receive objected-to coverage, or (2) violate the law and incur steep fines to obey those religious beliefs. Again, this is a Hobson's choice and thus a substantial burden on their religious exercise under RFRA. *Abdulhaseeb*, 600 F.3d at 1317; *Hobby Lobby*, 723 F.3d at 1141.

III. STRICT SCRUTINY

Because the government has imposed a substantial burden on at least the self- insured plaintiffs' religious exercise, under RFRA it must demonstrate that this burden is "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. Our precedent currently holds the government has no compelling interest in contraceptive coverage. *See Hobby Lobby*, 723 F.3d at 1143. But even assuming such a compelling interest, *see Hobby Lobby*, 134 S. Ct. at 2780 (assuming the same), 2785–86 (Kennedy, J., concurring), 2799 (Ginsburg, J., dissenting), the government cannot show this scheme is the least restrictive means of furthering that interest. As discussed above, the Supreme Court's interim orders

in *Little Sisters*, *Wheaton College*, and *Zubik*, even when interpreted so as to force self-insured non-profits to play a necessary causal role in contraceptive coverage, provide a less restrictive means of achieving the same goal. *See Priests For Life*, No. 13-5368, slip op. at 46–51 (Kavanaugh, J., dissenting). The existence of this less restrictive means dooms the current accommodation scheme under strict scrutiny. *Hobby Lobby*, 134 S. Ct. at 2781–82.

IV. CONCLUSION

"Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty," *Hobby Lobby*, 134 S. Ct. at 2760, a liberty essential to our country's constitutional tradition, albeit with boundaries difficult to define, *see id.* at 2785 (Kennedy, J., concurring). The Court today makes causation one of those boundaries. Even assuming this boundary, however, the self-insured plaintiffs in this case, with the exception of the *Little Sisters* plaintiffs, have clearly shown how their compelled act will cause their plan beneficiaries to receive objected-to coverage that they could not otherwise receive. Therefore, I dissent from the Court's holding regarding these self- insured plaintiffs. Even assuming a causation requirement, I would still hold these self- insured plaintiffs have shown a substantial likelihood of success on the merits of their RFRA claim and that the other requirements for a preliminary injunction are met. I would therefore affirm the district court's denial of a preliminary injunction in *Little Sisters*, 6 F. Supp. 3d 1225, affirm the district court's grant of a preliminary injunction in *Reaching Souls*, 2013 WL 6804259, and affirm in part (as to the self-insured plaintiffs: Southern Nazarene University

and Mid-America University) and reverse in part (as to the insured plaintiffs: Oklahoma Baptist University and Oklahoma Wesleyan University) the district court's grant of a preliminary injunction in *Southern Nazarene*, 2013 WL 6804265.

APPENDIX B

IN THE SUPREME COURT OF THE UNITED STATES

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, *et al.*

v.

KATHLEEN SEBELIUS, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*

No. 13A691

ORDER IN PENDING CASE

The application for an injunction having been submitted to Justice Sotomayor and by her referred to the Court, the Court orders: If the employer applicants inform the Secretary of Health and Human Services in writing that they are non-profit organizations that hold themselves out as religious and have religious objections to providing coverage for contraceptive services, the respondents are enjoined from enforcing against the applicants the challenged

provisions of the Patient Protection and Affordable Care Act and related regulations pending final disposition of the appeal by the United States Court of Appeals for the Tenth Circuit. To meet the condition for injunction pending appeal, applicants need not use the form prescribed by the Government and need not send copies to third-party administrators. The Court issues this order based on all of the circumstances of the case, and this order should not be construed as an expression of the Court's views on the merits.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martinez

Civil Action No. 13-cv-2611-WJM-BNB

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, *et al.*
PLAINTIFFS,

v.

KATHLEEN SEBELIUS, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*
DEFENDANTS

ORDER DENYING IN PART DEFENDANTS' MOTION TO DISMISS AND DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

In this case, Catholic religious organizations challenge the regulations implementing the Patient Protection and Affordable Care Act, Pub. L. 111-148, specifically the requirement that group health care plans provide all women coverage for certain preventative contraception services without a co-

payment or deductible.

Before the Court are the following: (1) Plaintiffs' Motion for Preliminary Injunction (ECF No. 15); and (2) Defendants' Motion to Dismiss or, in the alternative, for Summary Judgment (ECF No. 30). For the reasons set forth below, the Court finds that Plaintiffs have standing to bring this action and, therefore, the standing portion of the Motion to Dismiss is denied. The remainder of the issues raised in the Motion to Dismiss remain pending and will be ruled on by way of subsequent order. The Court also denies Plaintiffs' Motion for Preliminary Injunction.

I. BACKGROUND

A. HISTORY OF THE CHALLENGED REGULATIONS

The Patient Protection and Affordable Care Act (the "ACA") requires that group health insurance plans cover certain preventative medical services without cost-sharing, *i.e.*, a co-payment or a deductible. Among the preventative services that must be covered are contraception, sterilization, and related counseling (the "Mandate"). As set forth in more detail below, the Mandate results from extensive and complex Congressional legislation and agency rulemaking by the Department of Labor ("DOL"), the Department of the Treasury ("DOT"), and the Department of Health and Human Services ("HHS") (collectively, the "Departments").

In March 2010, Congress enacted the ACA along with the Health Care and Education Reconciliation Act. These acts placed a variety of new requirements on "group health plans," a term which encompasses both insured and self-insured employer plans that provide health care coverage to employees. *See* 42

U.S.C. § 300gg-91(a)(1) (defining "group health plan"); Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41,726, 41,727 (July 19, 2010) ("Interim Final Rules") ("The term 'group health plan' includes both insured and self-insured group health plans."). The portion of these acts that is relevant to this action is the requirement that group health plans provide coverage—at no charge to the patient—for women's "preventative care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration[.]" *See* 42 U.S.C. § 300gg-13(a)(4).

Because there were no existing guidelines concerning preventative care and screenings for women at the time of the Interim Final Rules, the Health Resources and Services Administration ("HRSA") commissioned the Institute of Medicine ("IOM"), a Congressionally-funded body, to conduct a study on preventive services necessary to women's health. The IOM, in a report entitled "Clinical Preventive Services for Women: Closing the Gaps," recommended that "preventative care and screenings" include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." Women's Preventive Services: Required Health Plan Coverage Guidelines, health resources and services administration, http://www.hrsa.gov/womensguidelines/ (last visited December 19, 2013). Among the FDA-approved contraceptive methods are diaphragms, oral contraceptive pills, emergency contraceptives, and

intrauterine devices.

HRSA adopted the IOM's recommendations on August 1, 2011. Two days later, the Interim Final Rules were amended to "provide HRSA additional discretion to exempt certain religious employers from the [HRSA] Guidelines where contraceptive services are concerned." Group Health Plan and Health Insurance Issuers Relating to Coverage of Preventative Services under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,623 (Aug. 3, 2011); *see also* 45 C.F.R. § 147.130(a)(1)(iv)(A). The amended Interim Final Rules permitted HRSA to exempt a religious organization that: "(1) has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization under section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code." *Id.*

The Departments received over 200,000 comments on the amended Interim Final Rules, including many submitted by religiously-affiliated institutions asserting that the religious employer exemption was too narrow, and that the limited scope of the exemption raised religious liberty concerns. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8,725, 8,726-27 (Feb. 15, 2012). Despite these comments, the Departments adopted the definition of religious employer set forth in the Interim Final Rules. *Id.* at 8,727. However, the Departments created a "temporary enforcement safe harbor" of one year during which they intended to "develop and

propose changes to these final regulations that would meet two goals—providing contraceptive coverage without cost-sharing to individuals who want it and accommodating non-exempt, non-profit organizations' religious objections to covering contraceptive services[.]" *Id.*

On March 21, 2012, the Departments published an advance notice of proposed rule-making ("Advance Notice") outlining alternative plans to accommodate religious organizations' objections to the Mandate. *See* Certain Preventative Services under the Affordable Care Act, 77 Fed. Reg. 16,501 (Mar. 21, 2012). The Departments received over 400,000 comments in response to the proposals set forth in the Advance Notice and, in July 2013, issued rules finalizing the Mandate. *See* Coverage of CertainServices under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,871 (July 2, 2013) (the "Final Rules").

The Final Rules provide that they accommodate for employers with religious objections to the Mandate in two ways. First, the Final Rules revise the definition of "religious employer" by eliminating the first three requirements contained in the Interim Final Rules. The Final Rules define "religious employer" as simply any non-profit referred to in 26 U.S.C. § 6033(a)(3)(A)(i) or (iii), which includes churches, their integrated auxiliaries, associations of churches, and the exclusively religious activities of religious orders. *See* 78 Fed. Reg. at 39,874.

Second, the Final Rules provide for an accommodation for "eligible organizations" that do not meet the definition of "religious employer". An "eligible organization" is one that meets the following criteria:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974 ["ERISA"].

45 C.F.R. § 147.131(b). The Final Rules state that an eligible organization is not required to "contract, arrange, pay, or refer for contraceptive coverage" to which it has a religious objection. 78 Fed. Reg. at 39,874. Instead, the eligible organization must complete a self-certification form stating that it is an eligible organization, and provide a copy of that form to its issuer (if the employer participates in an insured group healthplan) or to its third party administrator

(if the employer participates in a self-insured health plan). *Id.*

Upon receipt of the self-certification form, a third party administrator for a self-insured group health plan is required to provide or arrange for payments for contraceptive services, a requirement imposed through the Department of Labor's ERISA enforcement authority. *See id.* at 39,879-80. The Final Rules state that an eligible organization's self-certification "will be treated as a designation of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits pursuant to section 3(16) of ERISA." *Id.* at 39,879.

B. THE PARTIES AND THE PROCEDURAL HISTORY OF THIS CASE

Plaintiff Little Sisters of the Poor Home for Aged, Denver, Colorado is a Colorado non-profit corporation that was founded in 1916. (Compl. (ECF No. 1) 11.) Plaintiff Little Sisters of the Poor, Baltimore, Inc. is a Maryland non-profit corporation that was founded in 1869. (*Id.* 12.) Both homes are controlled by and associated with the Little Sisters of the Poor, an international Congregation of Catholic Sisters who serve needy elderly people. (*Id.* 13.) The Court will refer to these Plaintiffs together as"Little Sisters".

Little Sisters has adopted the Christian Brothers Employee Benefit Trust ("Trust") to provide medical coverage to their employees. (*Id.* 15.) Each Little Sisters home employs more than fifty employees who are covered, along with their dependents, under the Trust. (*Id.* 16.)

The Trust is a "church plan" within the meaning of section 414(e) of the Internal Revenue Code. (*Id.* 21.)

The Trust is not subject to ERISA because it has not made an election under section 410(d) of the Internal Revenue Code. (*Id.* 22.) The Trust is a self-insured health plan and, therefore, does not contract with an insurance company to provide health benefits to its beneficiaries. (*Id.* 23.) Consistent with Catholic teachings, the Trust does not provide, and has never provided coverage for, or access to, contraception, sterilization, abortifacients, and related education and counseling. (*Id.* 25.) The Trust is administered by Plaintiff Christian Brothers Services, a New Mexico non-profit corporation affiliated with The Brothers of The Christian Schools, a male religious order of the Catholic Church. (*Id.* 28.) Christian Brothers Services is a third party administrator for the Trust. (ECF No. 37-1 5.)

Defendants are all appointed officials of the United States government and its agencies charged with issuing and enforcing the regulations implementing the ACA. (Compl. 31.) Defendant Kathleen Sebelius is the Secretary of HHS; Defendant Thomas E. Perez is Secretary of the DOL; and Defendant Jacob J. Lew is Secretary of the DOT. (*Id.* 32-36.)

On September 24, 2013, Plaintiffs filed the instant action, which brings the following causes of action: (1) Violation of the Religious Freedom Restoration Act; (2) Violation of the First Amendment—Free Exercise Clause, Substantial Burden; (3) Violation of the First Amendment—Free Exercise Clause, Intentional Discrimination; (4) Violation of the First Amendment—Free Exercise and Establishments Clauses, Discrimination Among Religions; (5) Violation of the First Amendment—Establishment Clause, Selective Burden/Denominational Preference

(*Larson v. Valente*); (6) Interference in Matters of Internal Religious Governance—Free Exercise and Establishment Clauses; (7) Violation of the First and Fifth Amendments—Establishment Clause and Due Process, Religious Discrimination; (8) Violation of the Fifth Amendment—Due Process and Equal Protection; (9) Violation of the First Amendment—Freedom of Speech; (10) Violation of the First Amendment—Freedom of Speech, Expressive Association; (11) Violation of the First Amendment—Free Exercise Clause and Freedom of Speech, Unbridled Discretion; (12) Violation of the Administrative Procedure Act—Lack of Good Cause and Improper Delegation; (13) Administrative Procedure Act—Arbitrary and Capricious Action; (14) Administrative Procedure Act—Agency Action without Statutory Authority; (15) Administrative Procedure Act—Agency Action Not in Accordance with the Law, Weldom Amendment/Religious Freedom Restoration Act/First Amendment to the United States Constitution; and (16) Administrative Procedure Act—Agency Action Not in Accordance with the Affordable Care Act. (Compl. pp. 46-61.)

As preliminary relief, Plaintiffs request a preliminary injunction "prohibiting Defendants while this lawsuit is pending from enforcing the Final Mandate against the Plaintiffs . . . and prohibiting Defendants from charging or assessing penalties against the . . . Plaintiffs for failure to offer or facilitate access to contraceptives (including abortifacient contraceptives), sterilization procedures, and related education and counseling." (*Id.* p. 61.) As final relief, Plaintiffs seek a declaration that the Final Mandate violates the Religious Freedom Restoration Act, the First Amendment, the Fifth Amendment, and

the Administrative Procedures Act, and therefore no penalties can be assessed against Plaintiffs for failure to offer or facilitate access to contraceptives, sterilization, or abortifacients. (*Id.* p. 63-4.)

On October 24, 2013, Plaintiffs filed a Motion for Preliminary Injunction asking the Court to grant the preliminary relief sought in their Complaint. (ECF No. 15.) The Court set an abbreviated briefing schedule on the Motion for Preliminary Injunction to permit the Court the opportunity to address the issues by January 1, 2014, the date by which Plaintiffs must comply with the Mandate. (ECF No. 18.) Defendants filed their response on November 8, 2013 (ECF No. 29), and Plaintiffs filed their reply on November 15, 2013 (ECF No. 37). Thus, Plaintiff's Motion for Preliminary Injunction is ripe for review. No party requested a hearing on the Motion for Preliminary Injunction[1], and the Court finds that a hearing is not necessary to resolve the issues raised therein.

Contemporaneous with their Response to the Motion for Preliminary Injunction, Defendants filed a

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[1] Plaintiffs' Complaint states that they "respectfully request that the Court set a hearing on this request for a preliminary injunction at the earliest possible time and, after hearing, grant Plaintiffs' request for preliminary injunction." (Compl. 336.) However, this request, buried in the middle of a sixty-five page Complaint violates WJM Revised Practice Standard III.B., which requires that "[a]ll requests for the Court to take any action, make any type of ruling, or provide any type of relief must be contained in a separate, written motion. A request of this nature contained within a brief, notice, status report or other written filing does not fulfill this Practice Standard." Plaintiffs' actual Motion for Preliminary Injunction (ECF No. 15) does not request a hearing.

Motion to Dismiss or, in the alternative, for Summary Judgment. (ECF No. 30.) The Motion to Dismiss contends that Plaintiffs lack standing to bring this action, and also moves to dismiss or for summary judgment on all of the substantive claims. (*Id.*) Because the Court must ordinarily address issues such as standing before ruling on the merits of an action, the Court ordered an abbreviated briefing scheduled on the Motion to Dismiss. (ECF No. 33.) Plaintiffs filed their response on November 22, 2013 (ECF No. 42), and Defendants filed their reply on November 27,2013 (ECF No. 44.) Thus, Defendants' Motion to Dismiss is ripe for review.[2]

II. STANDING

Defendants move to dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(1), arguing that the Court lacks subject matter jurisdiction because Plaintiffs have failed to demonstrate that they will suffer an injury in fact.[3]

5. LEGAL STANDARD

Rule 12(b)(1) empowers a court to dismiss a complaint for "lack of jurisdiction over the subject

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[2] Plaintiffs have filed a Rule 56(d) Motion arguing that, if the Court construes Defendants' Motion as one for summary judgment, Plaintiffs should be permitted to conduct discovery before the Court makes any substantive ruling. (ECF No. 41.) Because the Court only considers the standing argument in this Order, and rules in Plaintiffs' favor, the Court need not address Plaintiffs' Rule 56(d) Motion at this time.

[3] In the interest of addressing Plaintiffs' Motion for Preliminary Injunction before the regulations take effect on January 1, 2014, this standing argument is the only portion of Defendants' Motion to Dismiss that will be addressed in this Order.

matter." Fed. R. Civ. P. 12(b)(1). Dismissal under Rule 12(b)(1) is not a judgment on the merits of a plaintiff's case. Rather, it calls for a determination that the court lacks authority to adjudicate the matter, attacking the existence of jurisdiction rather than the allegations of the complaint. *See Castaneda v. INS*, 23 F.3d 1576, 1580 (10th Cir. 1994) (recognizing federal courts are courts of limited jurisdiction and may only exercise jurisdiction when specifically authorized to do so). The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974). A court lacking jurisdiction "must dismiss the cause at any stage of the proceeding in which it becomes apparent that jurisdiction is lacking." *See id.*

A Rule 12(b)(1) motion to dismiss "must be determined from the allegations of fact in the complaint, without regard to mere conclusory allegations of jurisdiction." *Groundhog v. Keeler*, 442 F.2d 674, 677 (10th Cir. 1971). When considering a Rule12(b)(1) motion, however, the court may consider matters outside the pleadings without transforming the motion into one for summary judgment. *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). Where a party challenges the facts upon which subject matter jurisdiction depends, a district court may not presume the truthfulness of the complaint's "factual allegations . . . [and] has wide discretion to allow affidavits, other documents, and [may even hold] a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)." *Id.*

6. ANALYSIS

Article III of the United States Constitution limits the jurisdiction of federal courts to "[c]ases" and

"[c]ontrovers[ies]." U.S. Const. art. III, § 2. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976).

"[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see also Allen v. Wright*, 468 U.S. 737, 750 (1984) (holding that standing "is perhaps the most important of the [Article III] doctrines"). "The gist of the question of standing" is whether the plaintiffs have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

"[T]he irreducible constitutional minimum of standing contains three elements": (1) the plaintiff must have suffered a "concrete and particularized" injury that is "actual or imminent" (*i.e.*, an "injury in fact"); (2) there must be "a causal connection between the injury and the conduct complained of,"; and (3) it must be "likely . . . that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560-61 (quotation marks omitted); *see also Allen*, 468 U.S. at 751 ("A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.").

In evaluating a plaintiff's standing at the motion

to dismiss stage, a court may consider not only the allegations in the complaint, but also factual averments made by declaration or affidavit. In *Warth v. Seldin*, the United States Supreme Court stated,

> [In] ruling on a motion to dismiss for want of standing, [courts] must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. At the same time, it is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint *or by affidavits*, further particularized allegations of fact deemed supportive of plaintiff's standing. If, after this opportunity, the plaintiff's standing does not adequately appear from *all materials of record*, the complaint must be dismissed.

422 U.S. at 501-02 (emphasis added). Subsequent decisions by the Supreme Court and lower courts have reinforced this rule. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay*, 484 U.S. 49, 65 (1987) ("[A] suit will not be dismissed for lack of standing if there are sufficient allegations of fact—not proof—in the complaint *or supporting affidavits*.") (emphasis added) (internal quotations omitted); *Sac & Fox Nation of Mo. v. Pierce*, 213 F.3d 566, 573 (10th Cir. 2000) ("The Tribes' uncontroverted affidavits, albeit conclusory, support their allegations of injury. . . . [A] plaintiff may submit affidavits to particularize allegations of fact in support of its standing.").

In this case, Defendants argue that Plaintiffs have failed to meet their burden on the "injury in fact" prong of the standing analysis. (ECF No. 30 at 11-12.) Plaintiffs contend that they have standing "based on

the simple fact that compliance with the rules will require an expenditure of time and money." (ECF No. 42 at 27.) The Tenth Circuit has held that "out-of-pocket cost to a business of obeying a new rule of government" is sufficient to constitute an injury in fact. *Nat'l Collegiate Athletic Ass'n v. Califano*, 622 F.2d 1382, 1386 (10th Cir. 1980); *see also Hydro Res. Inc. v. EPA*, 608 F.3d 1131, 1144-45 (10th Cir. 2010) (business costs of undertaking permitting process are injury in fact). The cost need not be large; all that is required is some concrete and particularized injury. *See, e.g., Cressman v. Thompson*, 719 F.3d 1139, 1145 (10th Cir. 2013) (cost of $16.50 for specialized license plate was a "concrete, actual monetary injury" which established an injury in fact).

The self-certification form created by Defendants in accordance with the Final Rules states that it will take an average of fifty minutes for an employer to fill out the required information. (ECF No. 37-3.) The basis for this statement comes from the Administrative Record, which provides that "an organization will need approximately 50 minutes (30 minutes of clerical labor at a cost of $30.64 per hour, 10 minutes for a manager at a cost of $55.22 per hour, 5 minutes for legal counsel at a cost of $83.10 per hour, and 5 minutes for a senior executive at a cost of $112.43 per hour) to execute the self-certification." 78 Fed. Reg. 39,890. "[T]he total annual burden for preparing and providing the information in the self-certification is estimated to be approximately $41 for each eligible organization." *Id.*

Additionally, with regard to the burden imposed on any third party administrator that receives a self-certification form, the Administrative Record states

that: "It isestimated that each issuer or third party administrator will need approximately 1 hour of clerical labor (at $31.64 per hour) and 15 minutes of management review (at $55.22 per hour) to prepare the notices for a total cost of approximately $44." 78 Fed. Reg. 39,890. As the third party administrator for the Little Sisters and the Trust, Christian Brothers Services is likely to incur this cost upon receipt of these entities' self-certification forms.

Defendants insist that, to avoid incurring substantial fines, Little Sisters and the Trust will be required to complete the self-certification forms and deliver these forms to Christian Brothers Services. (ECF No. 44 at 10-11.) In fact, the Defendants base the standing portion of their Motion to Dismiss on the fact that execution of the form is all that is required of Plaintiffs, and that this is not sufficient injury for purposes of standing. (*Id.*) However, Defendants utterly fail to address the real, actual costs that Plaintiffs will incur by completing and processing the self-certification forms. (*Id.*) The Court finds that Plaintiffs will incur the costs set forth above, and that these costs constitute aninjury in fact for purposes of standing. *See Califano*, 622 F.2d at 1386. Therefore, Defendants' Motion to Dismiss is denied to the extent that it seeks dismissal of this action based on lack of standing.

III. INJUNCTIVE RELIEF

Plaintiffs ask the Court to enter an injunction that "prohibit[s] Defendants from enforcing the Mandate against Plaintiffs and class members, including their third party administrators, and from charging or assessing penalties against them for failure to offer or facilitate access to contraceptives." (ECF No. 15 at

16.)

"A party seeking a preliminary injunction must prove that *all four* of the equitable factors weigh in its favor: specifically, prove that '(1) it is substantially likely to succeed on the merits; (2) it will suffer irreparable injury if the injunction is denied; (3) its threatened injury outweighs the injury the opposing party will suffer under the injunction; and (4) the injunction would not be adverse to the public interest.'" *Sierra Club v. Bostick*, F. App'x, 2013 WL 5539633, *2 (10th Cir. Oct. 9, 2013) (emphasis in original) (quoting *Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009)). "[C]ourts have consistently noted that 'because a showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction, the moving party must first demonstrate that such injury is likely before the other requirements for issuance of an injunction will be considered.'" *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir. 2004) (quoting *Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904, 907 (2d Cir. 1990)). Because, as set forth below, the Court finds that Plaintiffs have failed to show that they will suffer an irreparable injury if the proposed injunction is not granted, the Court's analysis begins and ends with this prong.

Plaintiffs contend that they have satisfied the irreparable harm prong because they have shown that the Final Rules likely violate the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1(a). (ECF No. 15 at 13.) The Tenth Circuit has held that "establishing a likely RFRA violation satisfies the irreparable harm factor." *Hobby Lobby Stores, Inc. v.*

Sebelius, 723 F.3d 1114, 1146 (10th Cir. 2013). Thus, to determine whether Plaintiffs have shown an irreparable harm sufficient to warrant injunctive relief, the Court must examine whether Plaintiffs have shown that they are likely to suffer a RFRA violation in the absence of an injunction.

RFRA provides that the "Government shall not substantially burden a person's exercise of religion." 42 U.S.C. § 2000bb-1(a). To prevail on their RFRA claim, Plaintiffs must show that they wish "to engage in (1) a religious exercise (2) motivated by a sincerely held belief, which exercise (3) is subject to a substantial burden imposed by the government." *See Abdulhaseeb v. Calbone*,[4] 600 F.3d 1301, 1312-13 (10th Cir. 2010). Thus, in evaluating Plaintiffs' RFRA claim, the Court must first identify the religious belief, then determine whether such belief is sincere, and finally decide whether the government has placed "substantial pressure on the religious believer." *Hobby Lobby*, 723 F.3d at 1140.

As set forth below, the parties here do not dispute Plaintiffs' sincere religious beliefs and, therefore, only the third prong of the RFRA claim merits significant discussion. Plaintiffs contend that the Court's analysis of whether the Final Rules "substantially burden" their religious beliefs is governed by the Tenth Circuit's recent decision in *Hobby Lobby*. (ECF

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[4] The Court recognizes that *Abdulhaseeb* involved the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1(a) ("RLUIPA"), which is a different statute than RFRA. However, the Tenth Circuit has applied the same legal standard to both RFRA and RLUIPA, and *Abdulhaseeb* was heavily relied upon by the Tenth Circuit in *Hobby Lobby*, which is a RFRA case. *See Hobby Lobby*, 723 F.3d at 1140.

No. 37 at 6.) The Court agrees that Plaintiffs in this case share many of the same religious beliefs with the *Hobby Lobby* plaintiffs, at least the beliefs of the individual plaintiffs in that case. However, as Defendants point out, Hobby Lobby operates on a "for-profit" basis, and is therefore neither a religious employer nor an eligible organization under the Final Rules. *See Hobby Lobby*, 723 F.3d at 1140. Thus, the Mandate required the *Hobby Lobby* plaintiffs to either provide contraceptive coverage for their employees, or face fines ranging between $26 million and $475 million dollars. *Id.* This "Hobson's choice" was sufficient to establish a substantial burden on their religious beliefs. *Id.*

In this case, it is undisputed that Plaintiffs qualify as "eligible organizations" under the Final Rules. Plaintiffs are not similarly situated to the *Hobby Lobby* plaintiffs because Little Sisters and the Trust can avoid the fines levied upon non-compliance with the Mandate by signing the self-certification form and providing it to Christian Brothers Services, their third party administrator. The *Hobby Lobby* court had no occasion to consider the accommodation for "eligible organizations" in the Final Rules or to decide whether such accommodation violates RFRA. Thus, while *Hobby Lobby* is instructive on a number of issues in this case, it is not dispositive of the issue of whether, under the specific facts of this case, the Final Rules substantially burden these Plaintiffs' religious beliefs. The Court must therefore look at this issue anew.

In support of the Motion, Little Sisters has submitted multiple affidavits from Mother Loraine Marie Claire Maguire, the Provincial Superior of the Province of Baltimore for the Little Sisters of the Poor

("Mother Maguire") (ECF Nos. 15-1 & 37-1) and Brother Michael Quirk, President of Plaintiff Christian Brothers Services ("Brother Quirk") (ECF Nos. 15-2 & 37-2). Mother Maguire attests that Little Sisters follows Catholic religious teachings which affirm that life begins at conception, and that abortion and post-conception contraception are "gravely contrary to moral law". (Maguire Decl. (ECF No. 15-1) 29-32 (quoting Sections 2270 and 2271 of the Catechism of the Catholic Church (1994)).) She states that church doctrine teaches that contraception and sterilization are "intrinsic evils", and that "programs of 'economic assistance aimed at financing campaigns of sterilization and contraception' are 'affronts to the dignity of the person and the family.'" (*Id.* 33-34 (quoting Section 234 of the Compendium of the Social Doctrine of the Church (2004).) Citing Section 91 of the *Evangulium Vitae*, Mother Maguire attests that "Catholics may never 'encourage' the use of 'contraception, sterilization, and abortion.'" (*Id.* 35.) She relates that directives issued by the United States Conference of Catholic Bishops "prohibit providing, promoting, or condoning abortions, abortion-inducing drugs, contraceptives, and sterilization", and specifically warn against partnering with other entities in a manner that would involve the provision of such "intrinsically immoral" services. (*Id.* 36.) Brother Quirk's declarations echo these beliefs. (Quirk Decl. (ECF No. 15-2) 15-26.)

Little Sisters and the Trust contend that the Final Rules burden their religious beliefs by requiring that they:

- "participate in the provision of insurance coverage" or "provide health benefits to [their]

employees" that include access to contraception, abortion, and sterilization; (Maguire Decl. ¶¶ 45-47; *see also* Quirk Decl. ¶ 31.)

- "designate any third party" or "make" or "facilitate" the "government-required certifications to a third party" that require the third party to provide their employees with access to sterilization, contraception, and abortion-inducing drugs and device; (Maguire Decl. ¶¶ 48-49; *see also* Quirk Decl. ¶¶ 32-33.)
- "authorize anyone to arrange or make payments for contraceptives, sterilization, and abortifacients; take action that triggers the provision of contraceptive, sterilization, and abortifacients; or is the but-for cause of the provision of contraceptives, sterilization, and abortifacients." (Maguire Supp. Decl. (ECF No. 37-1) ¶ 9; *see also* Quirk Supp. Decl. (ECF No. 37-2) ¶ 8.)
- "[s]ign the self-certification form that on its face authorizes another organization to deliver contraceptives, sterilization, and abortifacients to the Little Sisters' employees and other beneficiaries now." (Maguire Supp. Decl. ¶ 9(A); *see also* Quirk Supp. Decl. ¶ 8.)
- "[d]eliver the self-certification form to another organization that could then rely on it as an authorization to deliver those contraceptives, sterilization, and abortifacients to the Little Sisters' employees and beneficiaries, now or in the future." (Maguire Supp. Decl. ¶ 9(B); *see also* Quirk Supp. Decl. ¶ 8.)

- "[c]reate a provider-insured relationship (between the Little Sisters and Christian Brothers Services or any other third-party administrator), the sole purpose ofwhich would be to provide contraceptives, sterilization, and abortifacients." (Maguire Supp. Decl. ¶ 9(D); *see also* Quirk Supp. Decl. ¶ 8.)
- "[p]articipate in a scheme, the sole purpose of which is to provide contraceptives, sterilization, and abortifacients to the Little Sisters' plan employees and other beneficiaries." (Maguire Suppl. Decl. ¶ 9(E); *see also* Quirk Supp. Decl. ¶ 8.)

Additionally, Christian Brothers Services contends that its religious beliefs are violated if it is required to "act as a 'third party administrator' under the Mandate because it would have to contract for, arrange for or otherwise facilitate the provision of abortifacients, sterilizations and contraception in violation of Catholic teachings." (Quirk Supp. Decl. 8.)

Defendants do not dispute that Plaintiffs hold the religious beliefs set forth above and that such beliefs are sincere. (ECF No. 29 at 8-9.) Rather, Defendants take issue with Plaintiffs' interpretation of how these religious beliefs will be impacted by the Mandate and the Final Rules. (*Id.*) Specifically, Defendants contend that "[t]he Little Sisters Plaintiffs are eligible for the accommodation, and thus, they need not contract, arrange, pay, or refer for contraceptive coverage." (*Id.* at 8.) Additionally, Defendants argue that, because Little Sisters participates in a self-funded "church plan", execution of the self-certification form does not trigger, facilitate, or provide access to care that would violate Plaintiffs' religious beliefs. (*Id.* at 8-9.)

In response, Plaintiffs argue that the Court cannot question Mother Maguire's and Brother Quirk's affirmations regarding the impact that compliance with the Final Rules would have on their religious beliefs. (ECF No. 37 at 6.) It is well-settled that "it is not for secular courts to rewrite the religious complaint of a faithful adherent, or to decide whether a religious teaching about complicity imposes 'too much' moral disapproval on those only 'indirectly' assisting wrongful conduct." *Hobby Lobby*, 723 F.3d at 1153-54; *see also Korte v. Sebelius*, 735 F.3d 654, 685 (7th Cir. 2013) (holding "[n]o civil authority can decide" whether providing contraceptive coverage impermissibly assists the commission of a wrongful act under the moral doctrines of the Catholic Church).

Thus, Plaintiff's contention that the Court cannot look behind their statements about what offends their religious beliefs is well-supported. However, the Court is under no such restriction with regard to Plaintiffs' construction of how the Final Rules operate, including the administrative burdens imposed on the parties by these regulations. Statutory and regulatory interpretation is a question of law, and is a joint effort of the courts and the government agency charged with administering a law. *See Negusie v. Holder*, 555 U.S. 511, 531 (2009). Thus, it is true that this Court cannot question whether a particular act or conduct, allegedly caused by a challenged regulation, violates a party's religious belief. This Court can, however, most certainly analyze the challenged regulations to determine whether their implementation will cause the allegedly harmful act to in fact occur. *See O'Brien v. Health and Human Servs.*, 894 F. Supp. 2d 1149, 1159 (E.D. Mo. 2012) (looking past plaintiff's contentions about how their religious beliefs would be

affected by the challenged regulations and interpreting the regulations to discern what demands were placed on plaintiff). Accordingly, in the discussion below, the Court will examine each of the ways in which Plaintiffs contend their religious beliefs are substantially burdened by the Final Rules.

A. DIRECT PROVISION OF COVERAGE FOR CONTRACEPTIVE CARE

Mother Maguire states that, based on Little Sisters' religious beliefs, they cannot not participate in the provision of insurance coverage for contraception, abortion and sterilization, and cannot provide health benefits that will include access to these services. (ECF No. 15-1 45-47.) Brother Quirk echoes this statement on behalf of the Trust. (ECF No. 15-2 31.) The Court accepts these religious beliefs as sincere, but does not find that the challenged regulatory scheme will substantially burden these beliefs.

Under the "eligible organizations" accommodation in the Final Rules, once Little Sisters and the Trust complete the self-certification form and deliver it to their third party administrator, they have satisfied the Mandate's requirements, and have no further obligations under the Mandate. 26 C.F.R. § 54.9815-2713A (stating that a self-insured group health plan complies with Mandate by contracting with a third party administrator and providing the third party administrator with the self-certification form). Thus, by their very terms, the regulations do not require Little Sisters or the Trust to participate in the provision of contraceptive coverage or provide health benefits that include contraceptive coverage.

Christian Brothers Services contends that it cannot "act as a 'third party administrator' under the Mandate because it would have to contract for, arrange for or otherwise facilitate the provision of abortifacients, sterilizations and contraception in violation of Catholic teachings." (Quirk Supp. Decl. 8.) However, Defendants' purported basis for the requirement that third party administrators for eligible organizations provide separate payments for contraceptive services arises from ERISA. *See* 78 Fed. Reg. 39,879-80. It is undisputed that the Trust is a self-insured "church"plan under 26 U.S.C. § 414(e), and as a consequence is not subject to ERISA, because it has not made an election under 26 U.S.C. § 410(d). (ECF No. 15-2 8-10.) Because the Trust is not subject to ERISA, Defendants candidly admit that they lack the regulatory authority to require Christian Brothers Services, as the third party administrator for Little Sisters and the Trust, to administer or pay for contraceptive care. (ECF No. 40 at 10-12 (citing 29 U.S.C. § 1003(b)(2) (exempting "church plans" from ERISA).) Thus, the Final Rules do not in fact require Christian Brothers Services to contract, arrange for, or otherwise facilitate the provision of contraceptives, sterilization, or abortifacients.

Because the Final Rules do not require any of the Plaintiffs to provide, participate in, contract or arrange for, or otherwise facilitate the provision of contraceptives, sterilization, or abortifacients, the Court concludes that the Final Rules do not substantially burden Plaintiffs' religious beliefs which forbid such actions.

B. AUTHORIZATION OF THIRD-PARTY TO PROVIDE COVERAGE

Mother Maguire also states that it would violate Little Sisters' religious beliefs to designate or authorize any third party to provide their employees with access to sterilization, contraception, and abortion-inducing drugs and services. (ECF No. 15-1 48; 37-1 9.) She avers that Little Sisters cannot "[c]reate a provider-insured relationship . . . the sole purpose of which would be to provide contraceptives, sterilization, and abortifacients." (ECF No. 37-1 9(D).) Brother Quirk makes the same statements on behalf of the Trust. (ECF No. 15-2 33; ECF No. 37-2 8.) Again, the Court does not question the sincerity of these religious beliefs. However, as set forth below, the Court finds that the Final Rules do not substantially burden such beliefs on this separate basis as well.

To comply with the Mandate (and avoid the significant penalties that come with non-compliance), an "eligible organization" must contract with a third party administrator and provide that third party administrator with the completed self-certification form. *See* 26 C.F.R. § 54.9815-2713A. These are the only two acts required for an eligible organization to comply with the Mandate. *Id.* Under Defendants' interpretation of the regulations, whether this third party administrator is subject to ERISA is irrelevant to whether an eligible organization has complied with the Mandate. (*See* ECF No. 44 at 10-12.)

It is undisputed that Christian Brothers Services is the third party administrator for the Trust. (ECF No. 37-1 5.) Christian Brothers Services does not currently provide the Trust's beneficiaries with access

to sterilization, contraception, and abortion-inducing drugs and services, and it does not intend to do so in the future. (ECF No. 15-2 27.) Defendants concede that they have no regulatory authority to require Little Sisters or the Trust to contract with a different third party administrator. (ECF No. 44 at 11.) Thus, the Final Rules do not require Little Sisters or the Trust to designate, authorize, or create a provider-insured relationship with any third party that will provide their employees with access to contraception, sterilization, or abortifacients.

The Court notes that the Final Rules could be construed to require an eligible organization to contract with a third party administrator that is willing to act as an ERISA plan administrator and claim administrator and take on all of the obligations set forth in 29 C.F.R. § 2510.3-16 and 26 C.F.R. § 54.9815-2713A. The Final Rules state that an eligible organization must: (1) "contract[] with one or more third party administrator" and (2) "provide each third party administrator that will process claims for any contraceptive services required to be covered under [the Mandate] with a copy of the self-certification" form. *See* 26 C.F.R. § 54.9815-2713A(b)(i) & (ii). The self-certification form must provide notice that: (1) the eligible organization "will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services"; and (2) the "[o]bligations of the third party administrator are set forth in 29 C.F.R. § 2510.3-16 and 26 C.F.R. § 54.9815-2713A." *Id.* at § 54.9815-2713A(b)(ii)(A) & (B). Reading these provisions together, an eligible organization could conclude that, to comply with the Mandate, it is required to contract with a third party

administrator who is willing to take on the obligations set forth in 29 C.F.R. § 2510.3-16 and 26 C.F.R. § 54.9815-2713A.

However, in this litigation, Defendants have plainly taken the position that, under 26 C.F.R. § 54.9815-2713A, an eligible organization satisfies the Mandate by providing the self-certification form to their third party administrator, irrespective of whether that third party administrator is governed by ERISA, will act as a plan and claims administrator for contraceptive care, or will provide payments for contraceptive services. (ECF No. 44 at 10-12.) As Defendants are the governmental authorities tasked with issuing and enforcing the regulations implementing the ACA (ECF No. 1 31), the Court must defer to their reasonable interpretation of such regulations.[5] *See Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 395 (2008) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845 (1984)). Defendants' position that an eligible

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[5] Plaintiffs' contention that this interpretation is not entitled to deference because it is just Defendants' litigation position finds no support in the record. Defendants are offering their interpretation of a regulation that has yet to come into effect and, therefore, such interpretation is not a *post hoc* rationalization. Defendants' interpretation is also their first interpretation of these regulations, and does not appear to simply be a convenient litigation position. Therefore, the Court sees no reason that such interpretation should not be entitled to an appropriate level of deference. *See Chase Bank USA, N.A. v. McCoy*, 131 S.Ct. 871, 880 (2011) (stating that the courts must defer to an agency's interpretation of its own regulation even when "advanced in a legal brief"); *see also Christoper v. SmithKline Beecham Corp.*, 132 S.Ct. 2156, 2166 (2012) (listing examples of when an agency's interpretation brought forth during litigation would not be entitled to deference).

organization satisfies the Mandate by providing the self-certification form to its third party administrator, even if that third party administrator is not governed by ERISA, is a reasonable construction of the Final Rules. As such, the Court is bound by this interpretation.

Thus, under Defendants' interpretation of the regulations, to satisfy the Mandate and avoid fines, Little Sisters and the Trust are required only to complete the self-certification form and provide it to their third party administrator. Whether this third party administrator is subject to ERISA or willing to provide their employees with access to contraceptive care is irrelevant to whether they have complied with the Mandate. Accordingly, the Court finds that the challenged regulations do not require Little Sisters or the Trust to designate, authorize, or contract with a third party administrator that will provide their employees with access to sterilization, contraception, and abortion-inducing drugs and services.

C. COMPLETION AND DISTRIBUTION OF THE SELF-CERTIFICATION FORM

Plaintiffs next contend that the requirement that they complete the self-certification form and deliver it to their third party administrator violates their religious beliefs. (ECF No. 37 at 6.)

The self-certification form ("Form") provides that it is "to be used to certify that the health coverage established or maintained or arranged by the organization listed below qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing, pursuant to 26 CFR 54.9815-

2713A[6], 29 CFR 2590.715-2713A[7], and 45 CFR 147.131[8]." (ECF No. 37-3 at 1.) An organization completing the Form must list its name, the name and title of the person authorized to make the certification on behalf of the organization, and provide identifying information for the person completing the certification. (*Id.*) The person who signs the Form must "certify that, on account of religious objections, the organization opposes providing coverage for some or all of any contraceptive services that would otherwise be required to be covered; the organization is organized and operates as a non-profit entity; and the organization holds itself out as a religious organization." (*Id.*) This person must also attest to the fact that all representations made on the Form are true, correct, and complete, to the best of her knowledge and belief. (*Id.*)

On the back of the Form, there is a notice to

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[6] Part 54 of Title 26 contains regulations related to pension excises taxes implemented by the Internal Revenue Service. As discussed in detail above, 26 CFR 54.9815-2713A defines the entities that qualify as "eligible organizations" and outlines what eligible organizations must do to comply with the Mandate. This regulation does not specifically state that it applies to church plans, but also does not specifically exempt church plans.

[7] This provision is identical to 26 CFR 54.9815-2713A but appears in part 54 of Title 29, which contains regulations related to group health plans implemented by the Employee Benefits Security Administration within the Department of Labor.

[8] This provision defines an "eligible organization" (using the same definition contained in both 26 CFR 54.9815-2713A and 29 CFR 2590.715-2713A) and sets forth how an eligible organization who is insured under a group health plan complies with the Mandate. It does not mention self-insured group health plans or church plans.

third party administrators which states:

> In the case of a group health plan that provides benefits on a self-insured basis, the provision this certification to a third-party administrator for the plan that will process claims for contraceptive coverage required under 26 CFR 54.9815-2713(a)(1)(iv) or 29 CFR 2713(a)(1)(iv) constitutes notice to the third party administrator that the eligible organization:
>
> (1) Will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and
>
> (2) The obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A.
>
> This certification is an instrument under which the plan is operated.

(ECF No. 37-3 at 2.)

In her Supplemental Declaration, Mother Maguire states that, because of their religious beliefs, Little Sisters cannot "[s]ign the self-certification form that on its face authorizes another organization to deliver contraceptives, sterilization, and abortifacients to the Little Sisters' employees and other beneficiaries". (ECF No. 37-1 ¶ 9(A).) The Court finds that this contention reads too much into the language of the Form, which requires only that the individual signing it certify that her organization opposes providing contraceptive coverage and otherwise qualifies as an eligible organization. (ECF No. 37-3 at 1.) The Form contains a notice outlining the duties of third party

administrators that receive the Form, but nothing on the face of the Form expressly authorizes the provision of contraceptive care, particularly with regard to church plans.

Additionally, as applied to the facts of this case, Little Sisters' execution of the Form does not authorize any organization to deliver contraceptive coverage to Little Sisters' employees. The regulations cited in the notice direct the third party administrator to ERISA regulations outlining the obligations of a plan administrator under ERISA. *See* 26 C.F.R. § 54.9815-2713A(b)(ii)(B) ("Obligations of the third party administrator are set forth in 29 CFR 2510.3-16 and 26 CFR 54.9815-2713A."); 29 C.F.R. § 2510.3-16 (an ERISA regulation which states that a third party administrator that receives a copy of a self-certification form from an eligible organization becomes "the plan administrator under section 3(16) of ERISA for any contraceptive services.").

Plaintiffs contend that, on its face, the Form does not make clear that only third party administrators governed by ERISA are responsible for making payments for contraceptive care. (ECF No. 42 at 27-28.) Plaintiffs also contend that the regulations make no exception for third party administrators of church plans. (ECF No. 37-2 12.) However, as Plaintiffs also acknowledge, church plans are categorically exempt from ERISA altogether. (ECF No. 15-2 9.) Given this blanket exemption, it would be unreasonable to require Defendants to specifically exempt church plans each time they promulgate a new regulation under their ERISA authority. Clearly, therefore, given this regulatory framework, the fact that church plans are not specifically exempted from the requirements

levied on third party administrators by the Final Rules does not mean that church plan third party administrators are bound to comply with these regulations.

Mother Maguire and Brother Quirk are aware that the Trust is a self-funded church plan, and that Christian Brothers Services is the third party administrator for the Trust. (ECF No. 37-1 5; ECF No. 15-2 4, 8.) Because a church plan and its third party administrator are not subject to ERISA, if these individuals complete the Form on behalf of their respective organizations, they know that they are not "authoriz[ing] another organization to deliver contraceptives, sterilization, and abortifacients to the Little Sisters' employees and other beneficiaries".

Mother Maguire also states that Little Sisters also cannot "[d]eliver the self-certification form to another organization that could then rely on it as an authorization to deliver these contraceptives, sterilization, and abortifacients to the Little Sisters' employees". (*Id.* 9(B).) However, as discussed above, Little Sisters is not required to deliver the Form to any organization other than its current third party administrator, Christian Brothers Services. The record is clear that Christian Brothers Services has no intention of delivering contraceptive, sterilization, and abortifacients to Little Sisters'employees, and no intention of contracting with another entity that will provide such services. (ECF No. 15-2 27 & 32.) Defendants have explicitly stated that they have no authority to require that Little Sisters and/or Christian Brothers Services contract with a third party provider who is subject to ERISA, or who is willing to provide contraceptive coverage to Little

Sisters' employees. (ECF No. 44 at 10-12.) Thus, Plaintiffs' contention that their religious beliefs are substantially burdened because the Form executed by the Little Sisters' could be relied on by another organization to provide contraceptive services to Little Sisters' employees is pure conjecture, one that ignores the factual and legal realities of this case.[9]

Finally, Mother Maguire contends that it would violate Little Sisters' religious beliefs if they are required to "[p]articipate in a scheme, the sole purpose of which is to provide contraceptives, sterilization, and abortifacients to the Little Sisters' plan employees or other beneficiaries." (ECF No. 37-1 9(E).) Brother Quirk echoes these thoughts exactly. (ECF No. 37-2 8.) Again, this statement ignores the realities of this case. Christian Brothers Services has plainly stated that it has not and does not intend to facilitate the provision of contraceptives, sterilization, or abortifacients. (ECF No. 37-2 8.) Therefore, if Mother Maguire executes the Form and delivers it to Christian Brothers Services—the only acts required of her under the "scheme" set forth in the Final Rules—Little Sisters' employees will not be provided

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[9] Were Little Sisters required to deliver the completed Form to a major health insurance company, such as Blue Cross Blue Shield or Kaiser Permanente, then the situation would be vastly different, as these insurance companies could rely on the Form as authorization to deliver contraceptive care to Little Sisters' employees. More likely, because these entities are subject to ERISA, they would be required to rely on the Form and act as plan and claims administrator for purposes of contraceptive care. But, because the Trust is a church plan and Defendants lack the authority to require it to contract with an entity subject to ERISA, the Court need not consider these hypotheticals, as they relate to facts not before the Court in this case.

contraceptives, sterilization, or abortifacients through their employer-sponsored health plan. Similarly, if Brother Quirk executes the Form on behalf of the Trust and delivers it to Christian Brothers Services, as he is required to do, no beneficiary of health care through the Trust will be provided contraceptives, sterilization or abortifacients through the employer-sponsored health plan.

The purpose of Little Sisters and the Trust executing and delivering the Form to their third party administrator is not to provide contraceptives, sterilization, and abortifacients to the Little Sisters' plan employees or other beneficiaries. It is clear that these services will not be offered to the employees regardless of whether the Form is executed and delivered to Christian Brothers Services. Instead, on the facts of this case, the "sole purpose" of the execution and delivery of the Form is to comply with the Mandate and avoid the substantial penalties for non-compliance.

Accordingly, on the facts of this case, the Court finds it will not substantially burden Plaintiffs' religious beliefs for an authorized representative of these organizations to execute the self-certification form and deliver it to their third party administrator. Nor are Plaintiffs being required to buy into a scheme that substantially burdens their religious beliefs.

D. IRREPARABLE HARM CONCLUSION

To satisfy their burden of showing irreparable harm, the only argument Plaintiffs make is that a RFRA violation is always irreparable harm. (ECF No. 15 at 16.) As set forth in detail above, the Court finds that Plaintiffs have not demonstrated a likely RFRA

violation. While the Court does not question the sincerity of Plaintiffs' beliefs, the Court finds that the Final Rules will not function in a manner that substantially burden these beliefs. Because Little Sisters' employees receive their health care coverage through the Trust, which is a self-insured church plan with a Catholic third party administrator, these employees will not be provided access to contraception, sterilization, or abortifacients through this health plan. Defendants have freely admitted that they lack the regulatory authority at this time to force a different result.

Plaintiffs repeatedly emphasize that the Defendants have only conceded that they lack the authority "at this time" to require third party administrators of church plans to administer claims for contraceptive services. (*See* ECF No. 15-2 4.) The Court acknowledges that the regulations implementing the ACA are in flux, and that Congress may, at some point in the future, grant Defendants some authority outside of ERISA to enforce the Mandate, and/or promulgate new regulations that apply to church plans. Indeed, there is a story on the news almost daily about changes being made to the ACA regulations. However, the Court cannot and will not hypothesize or speculate about how such future changes may impact Plaintiffs.

"To constitute irreparable harm, an injury must be certain, great, actual 'and not theoretical.'" *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (quoting *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)); *see also Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931) ("Injunction issues to prevent existing or presently threatened

injuries. One will not be granted against something merely feared as liable to occur at some indefinite time in the future."). "[T]he party seeking injunctive relief must show that the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001). *Id.*

The Court finds that Plaintiffs have failed to meet this burden. Plaintiffs ignore the fact that, as participants in a church plan, they fall outside of Defendants' current enforcement authority. Plaintiffs would have the Court surmise that their self-certification form could be relied on by a hypothetical third party administrator to facilitate the provision of contraception, sterilization, and abortifacients to their employees at some point in the future. However, the Court is tasked with determining only whether the regulations, as they currently stand, substantially burden Plaintiffs'religious beliefs. Given the current version of the regulations, as applied to the facts of and parties to this case, the Court finds that Plaintiffs have failed to show that any injunction is necessary to prevent an imminent harm.

IV. CONCLUSION

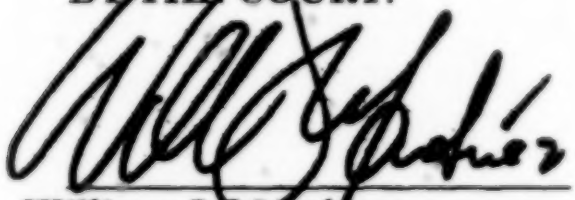
It is well settled that a preliminary injunction is an extraordinary remedy, and that it should not be issued unless the movant's right to relief is "clear and unequivocal." *Kikumura v. Hurley*, 242 F.3d 950, 955 (10th Cir. 2001). For the reasons set forth above, the Court finds that Plaintiffs have failed to show a clear and unequivocal right to injunctive relief. As such, the Court ORDERS as follows:

1. Plaintiffs' Motion for Preliminary Injunction (ECF No. 15) is DENIED;

2. Defendants' Motion to Dismiss, or in the alternative, for Summary Judgment (ECF No. 30) is DENIED to the extent it seeks dismissal of this case for lack of standing. The Court RESERVES RULING on the remainder of the issues raised in the Motion to Dismiss.

Dated this 27th day of December, 2013.

BY THE COURT:



William J. Martínez
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

REACHING SOULS INTERNATIONAL, INC., *et al.*
PLAINTIFFS,

v.

KATHLEEN SEBELIUS, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*
DEFENDANTS

Case No. CIV-13-1092-D

MEMORANDUM DECISION AND ORDER

Before the Court are Plaintiffs' Motion for Preliminary Injunction [Doc. No. 7] and Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction [Doc. No. 51]. Plaintiffs' Motion seeks relief pursuant to Fed. R. Civ. P. 65(a) from federal regulations implementing the Affordable Care Act ("ACA")[1] that provide a mechanism for

[1] The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

certain religious employers to avoid the mandate to include contraceptive services in group health plan coverage, by executing a required self-certification form. This mechanism – referred to as the "accommodation" – is now codified in 26 C.F.R. § 54.9815-2713A, 29 C.F.R. § 2590.715-2713A, and 45 C.F.R. § 147.131. Defendants' Motion seeks dismissal of the action pursuant to Fed. R. Civ. P. 12(b)(1) on the ground that Plaintiffs lack constitutional standing to challenge the accommodation. The Motions, which are fully briefed and at issue, were the subject of a hearing held December 16, 2013.[2]

BACKGROUND

Plaintiffs Reaching Souls International, Inc. and Truett-McConnell College, Inc. are nonprofit religious organizations that provide benefits to employees through a group health plan sponsored by Plaintiff GuideStone Financial Resources of the Southern Baptist Convention ("GuideStone"). The plan provides group health benefits on a self-insured basis for organizations associated with the Southern Baptist Convention, which share its religious views regarding abortion and contraception, and rely on GuideStone to provide coverage consistent with those views. Defendants are federal agencies and officials responsible for promulgating ACA's implementing

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[2] The purposes of the hearing were to receive any relevant evidentiary materials and to hear oral arguments. The parties elected not to present evidence but, instead, relied on written materials submitted with their briefs, except Plaintiffs provided copies of certain regulations and EBSA Form 700.

regulations.[3] During the rule-making process, the accommodation was adopted as a means for nonexempt religious organizations that provide employee health benefits and have religious objections to some contraceptive methods, to comply with ACA's mandate of contraceptive coverage as a preventive care service for women. *See* 42 U.S.C. § 300gg-13. Plaintiffs' Complaint asserts numerous statutory and constitutional challenges to the accommodation. The primary focus of Plaintiffs' Motion and supporting arguments, however, are the Religious Freedom Restoration Act of 1993 as amended, 42 U.S.C. § 2000bb *et seq.* ("RFRA"), and the Tenth Circuit's decision in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir.), *cert. granted*, 82 U.S.L.W. 3139 (2013). Also, Plaintiffs seek injunctive relief broad enough to protect a putative class of similarly situated employers, as defined in their Complaint. *See* Compl. [Doc. No. 1], 18.[4]

Defendants deny this case is controlled by *Hobby Lobby*, which concerned the contraceptive-coverage mandate rather than the accommodation. Defendants concede, however, that this Court is bound by the Tenth Circuit's decision of certain issues and must find

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[3] Defendants are: Kathleen Sebelius, Secretary of the United States Department of Health and Human Services; United States Department of Health and Human Services; Thomas E. Perez, Secretary of the United States Department of Labor; United States Department of Labor; Jacob J. Lew, Secretary of the United States Department of the Treasury; and United States Department of the Treasury.

[4] Alternatively, Plaintiffs have filed a Motion for Class Certification [Doc. No. 8] to obtain class-wide relief from enforcement of the contraceptive mandate against similarly situated, nonexempt religious organizations.

in Plaintiffs' favor on parts of the preliminary injunction analysis. Also, if Plaintiffs' Motion is granted, Defendants "do not object to the scope of the resulting preliminary injunction including the named plaintiffs as well as any members of the class plaintiffs have proposed in their complaint." *See* Defs.' Mem. Opp'n Pls.' Mot. Prelim. Inj. [Doc. No. 50], at 40. The focus of Defendants' Motion, and their opposition to Plaintiffs' Motion for Preliminary Injunction, is a contention that the accommodation will not result in actual injury to Plaintiffs (as required for standing) or substantially burden their religious beliefs (as required to succeed under RFRA). Defendants do not question the sincerity of Plaintiffs' stated beliefs, but Defendants instead argue that any burden on those beliefs is either illusory, speculative, or *de minimis*, for reasons explained *infra*.

FINDINGS OF FACT

Many facts relevant to the Court's analysis of the Motions are undisputed. Because the allegations of the Complaint and statements in affidavits regarding Plaintiffs' organizational structure, religious character, and religious beliefs are unchallenged, they are accepted as true for present purposes.

The Southern Baptist Convention is an association of Christian churches that share common religious beliefs, including support for the sanctity of human life from conception to natural death, and opposition to abortion and abortion-inducing drugs. GuideStone is a nonprofit corporation formed and controlled by the Southern Baptist Convention; it is a tax-exempt church benefits board that assists churches and other religious organizations by facilitating retirement plan

services, health benefits coverage, risk management, and other benefit programs. GuideStone established the GuideStone Plan as a multiple-employer, self-insured health plan that qualifies as a "church plan" and thus is not subject to ERISA.[5] Consistent with the religious convictions of the Southern Baptist Convention, the GuideStone Plan does not cover expenses associated with the elective termination of a pregnancy, including contraceptive drugs or devices considered to be abortifacients. GuideStone has agreements with two corporations, one of which is Highmark Health Services, to provide claims administration services.

Reaching Souls International, Inc. ("Reaching Souls") is a nonprofit corporation founded by a Southern Baptist minister for an evangelical purpose. Its principal officers are Southern Baptist ministers and its faith-based ministry includes training and support for missionaries in Africa, India, and Cuba and an orphan-care program. Truett-McConnell College, Inc. ("Truett-McConnell") is a nonprofit corporation owned by the Georgia Baptist Convention that operates a private, Christian liberal arts college. Both organizations have adopted the GuideStone Plan as a means to provide comprehensive health care benefits for their employees. Reaching Souls has approximately 10 full-time employees; Truett-McConnell has approximately 80 full-time employees. Neither organization qualifies for ACA's "religious employer" exemption, *see* 45 C.F.R. §§ 147.130(a)(1)(iv)(B), 147.131(a); and the GuideStone

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[5] The Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 *et seq*. The definition of "church plan" appears at § 1002(33); the exemption appears at § 1003(b)(2).

Plan does not qualify for ACA's "grandfathered" health plan exemption, *see* 26 C.F.R. § 54.9815-1251T.

Although the parties disagree whether the contraceptive drugs to be covered under ACA's mandate are abortifacients, it is undisputed that Plaintiffs oppose providing coverage for the same contraceptive methods at issue in *Hobby Lobby*, 723 F.3d at 1123, 1125, on account of religious objections. Thus, under the challenged regulations, Reaching Souls, Truett-McConnell, and other similarly-situated employers would qualify as an "eligible organization" for the accommodation if they execute the required self-certification form and provide it to a third party administrator ("TPA") for the GuideStone Plan. *See* 26 C.F.R. § 54.9815-2713A(a)-(b); 29 C.F.R. § 2590.715-2713A(a)-(b); 45 C.F.R. § 147.131(b). Under the accommodation process contemplated by the regulations, a TPA receiving notice of self-certification would provide or arrange payments for mandated contraceptive services (including those objected to by Plaintiffs), and could seek reimbursement for the covered services plus an additional "allowance for administrative costs and margin" of at least 10 percent of total payments. *See* 45 C.F.R. § 156.50(d)(3)(ii). The TPA would also provide notice to plan participants and beneficiaries of the availability of contraceptive coverage, without cost sharing. *See* 26 C.F.R. § 54.9815-2173A(d); 29 C.F.R. § 2590.715-2173A(d).

Reaching Souls, Truett-McConnell, and other employers who have adopted the GuideStone Plan face a deadline of January 1, 2014, to elect among four alternatives: 1) discontinue participation in the GuideStone Plan and secure alternative coverage

that complies with ACA's contraceptive mandate; 2) violate the mandate and incur penalties of $100 per day for each affected individual, *see* 26 U.S.C. § 4980D(b)(1); 3) discontinue all health plan coverage for employees;[6] or 4) self-certify that the organization qualifies for the accommodation. Similarly, GuideStone must decide by December 31, 2013, whether to: 1) do nothing and expose nonexempt employers to ACA penalties for failing to provide contraceptive coverage under the GuideStone Plan, unless the employers discontinue participation in the plan; 2) assist eligible organizations with the accommodation process; or 3) discontinue coverage under the GuideStone Plan for organizations that do not satisfy ACA's "religious employer" exemption. It is undisputed that complying with the mandate, incurring penalties for noncompliance, or discontinuing coverage would cause actual injury to Plaintiffs and substantially burden their religious beliefs. The questions presented – for purposes of standing and success under RFRA – involve only the impact of the accommodation on eligible organizations that participate in the GuideStone Plan.

All Plaintiffs have presented statements regarding their religious beliefs that reflect religious objections to participating in the accommodation process. Plaintiffs believe that executing the self-certification form, or

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[6] All Plaintiffs state that their religious beliefs require them to provide health care coverage for employees, as a matter of value and respect for employees and commitment to the well-being of employees and their families. Cancellation of health coverage would also subject a "large employer" like Truett- McConnell to an annual penalty of $2,000 per full-time employee. *See* 26 U.S.C. § 4980H(a), (c)(1)-(2).

otherwise assisting in the implementation of ACA's contraceptive mandate, would cause them to facilitate contraceptive coverage and would violate sincere religious principles.

MOTION TO DISMISS

A. Standard of Decision

Standing to sue is a jurisdictional issue properly raised by a Rule 12(b)(1) motion. *See Wilderness Society v. Kane County*, 632 F.3d 1162, 1168 (10th Cir. 2011) (en banc); *see also Colorado Envtl. Coal. v. Wenker*, 353 F.3d 1221, 1227 (10th Cir. 2004). Defendants' Motion also raises a factual attack on jurisdiction, that is, Defendants "go beyond the allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends." *E.F.W. v. St. Stephen's Indian High School*, 264 F.3d 1297, 1303 (10th Cir. 2001) (internal quotation omitted). Defendants contend the injury alleged in the Complaint – requiring Plaintiffs to trigger or facilitate coverage for contraceptive services – does not actually exist and "there is absolutely no connection between plaintiffs and contraceptive coverage" under the accommodation. *See* Defs.' Mot. Dism. [Doc. No. 51] at 18.

"In addressing a factual attack, the court does not presume the truthfulness of the complaint's factual allegations, but has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)." *see E.F.W.*, 264 F.3d at 1303 (internal quotation omitted). In the context of this case, however, there are no disputed jurisdictional facts. As discussed *infra*, Defendants' Motion is

based on a contention that the challenged regulations do not have the legal effect alleged by Plaintiffs and, even if Plaintiffs could establish their factual allegations, they cannot show an injury that would establish standing. Therefore, Defendants' Motion may properly be resolved under Rule 12(b)(1).[7]

B. Plaintiffs' Standing

Defendants' Motion challenges Plaintiffs' Article III standing. To overcome the Motion, Plaintiffs "must show an injury that is '[1] concrete, particularized, and actual or imminent; [2] fairly traceable to the challenged action; and [3] redressable by a favorable ruling.'" *Hobby Lobby*, 723 F.3d at 1126 (quoting *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013)) (internal quotation omitted). The first element requires that Plaintiffs "must have suffered an 'injury in fact' – an invasion of a legally protected interest." *See Lujan v. Defenders of Wildlife*, 504 U.S.

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[7] Under the law of this circuit, a Rule 12(b)(1) motion that raises a factual attack on subject matter jurisdiction must be converted to a Rule 56 motion for summary judgment "when resolution of the jurisdictional question is intertwined with the merits of the case." *See Pringle v. United States*, 208 F.3d 1220, 1222 (10th Cir. 2000); *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995); *see also Los Alamos Study Group v. United States Dep't of Energy*, 692 F.3d 1057, 1063-64 (10the Cir. 1012). In this case, however, Defendants maintain that the jurisdictional issue of standing may be resolved "on the pleadings, documents incorporated by reference into the complaint, and judicially noticeable matters – all of which the Court may consider in reviewing defendants' motion to dismiss." *See* Defs.' Reply Supp. Mot. Dism. [Doc. No. 59] at 2-3. Thus, the Court finds no need to treat Defendants' Motion as a summary judgment motion. Further, any factual disputes are not germane to the Court's jurisdictional analysis, discussed *infra*.

555, 560 (1992).

The asserted injury in this case flows from the accommodation's requirement that eligible religious organizations, like Reaching Souls and Truett-McDonnell, must execute the self-certification form and initiate a process by which contraceptive services that they oppose on religious grounds may be provided free of charge to female employees and dependents who are health plan beneficiaries. Defendants' position in this case is that a TPA of a church plan, like the GuideStone Plan, is not required to cover contraceptive services because ERISA provides the only implementing or enforcement authority for the accommodation, and church plans are not subject to ERISA. Defendants thus argue that the accommodation regulations do not apply to the GuideStone Plan as a matter of law, and Plaintiffs' (or a TPA's) mistaken legal view that the regulations do apply cannot create an actual or imminent injury. Defendants' litigation position in this case has been taken in only one other case for which a written decision is available, *Roman Catholic Archdiocese of New York v. Sebelius*, No. 12 Civ. 2542, 2013 WL 6579764, *6 (E.D.N.Y Dec. 16, 2013) (to be published), and was first asserted on October 31, 2013. *See* Defs.' Resp. Pls.' Mot. Accelerated Briefing Sched. [Doc. No. 19] at 2-3 n.1. Upon consideration, the Court is not persuaded that Defendants' position deprives Plaintiffs of standing.

Plaintiffs' religious beliefs – the sincerity of which is unchallenged – prevent them from participating in a regulatory process designed to provide health care coverage that they oppose on religious grounds, even if the extent of their participation is taking the first

step required by the regulations and permitting the remaining process to play out through other actors. By signing the form, an eligible organization self-certifies that it qualifies for the accommodation and, thus, that its employees and their dependents qualify for contraceptive coverage outside of their health plan. After signing the self-certification form, Plaintiffs must provide it to a TPA for the GuideStone Plan in order to satisfy ACA's contraceptive mandate through the accommodation process formulated by Defendants to extend contraceptive coverage to employees of nonexempt religious organizations. The self-certification form itself notifies a TPA of the obligations set forth in federal regulations regarding the accommodation. These obligations include providing written notice to health plan participants and beneficiaries of the availability of contraceptive coverage without cost sharing. Regardless whether the notice actually results in the provision of contraceptive services to which Plaintiffs object, the accommodation requires that Plaintiffs either participate in a procedure devised by federal officials to implement ACA's mandate of contraceptive coverage, or incur substantial penalties. Either spiritual or financial harm is sufficient, by itself, to establish an actual injury, traceable to Defendants, and redressable by a ruling in Plaintiffs' favor.

The Court reaches the same conclusion as the district judge in *Roman Catholic Archdiocese of New York*, the Honorable Brian M. Cogan, who capably expressed the analysis of Plaintiffs' injury-in-fact:

> [P]laintiffs' alleged injury is that the [accommodation] renders them complicit in a scheme aimed at providing coverage to which

> they have a religious objection. This alleged spiritual complicity is independent of whether the scheme actually succeeds at providing contraceptive coverage. It is undisputed that all of the non-exempt plaintiffs will still have to either comply with the Mandate and provide the objectionable coverage or self-certify that they qualify for the accommodation. Plaintiffs allege that their religion forbids them from completing this self-certification, because to them, authorizing others to provide services that plaintiffs themselves cannot is tantamount to an endorsement or facilitation of such services. Therefore, regardless of the effect on plaintiffs' TPAs, the regulations still require plaintiffs to take actions they believe are contrary to their religion.

Roman Catholic Archdiocese of New York, 2013 WL 6579764 at *7 (citations omitted).

In short, the alleged fact that the accommodation requires Plaintiffs to take action that is repugnant to their sincere religious beliefs constitutes a sufficient injury to satisfy the constitutional minimum of standing. Therefore, the Court finds that Plaintiffs have standing to challenge the accommodation.

MOTION FOR PRELIMINARY INJUNCTION

To prevail on their Motion, Plaintiffs must establish: a) they are likely to succeed on the merits; b) they are likely to suffer irreparable harm in the absence of preliminary relief; c) the balance of equities tips in their favor; and d) an injunction is in the public interest. *See Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008); *Crowe & Dunlevy, P.C.*

v. Stidham, 640 F.3d 1140, 1157 (10th Cir. 2011); *see also Hobby Lobby*, 723 F.3d at 1128. In this federal circuit, courts generally apply a modified standard under which, if a movant establishes that other requirements tip strongly in his favor, the movant "may meet the requirement for showing success on the merits by showing that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1255-56 (10th Cir.2003); *see O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 976 (10th Cir. 2004) (en banc), *aff'd sub nom.*, 546 U.S. 418 (2006). The modified standard does not apply, however, to certain types of "historically disfavored" preliminary injunctions. *See O Centro*, 389 F.3d at 975; *see also Attorney General v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009); *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009). Also, the modified standard does not apply where the movant seeks "to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme." *See Heideman v. South Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003); *see also Nova Health Sys. v. Edmondson*, 460 F.3d 1295, 1298 n.6 (10th Cir. 2006); *Aid for Women v. Foulston*, 441 F.3d 1101, 1115 (10th Cir. 2006). Courts "presume that all governmental action pursuant to a statutory scheme is 'taken in the public interest.'" *See Aid for Women*, 441 F.3d at 1115 n.15.

In this case, Plaintiffs are seeking to restrain action of federal agencies taken in the public interest, and therefore, the modified standard does not apply. Thus, Plaintiffs "must meet the traditional

'substantial likelihood of success' standard." *Nova Health Sys.*, 460 F.3d at 1298 n.6.

A. Likelihood of Success on the Merits

RFRA prohibits the federal government from substantially burdening a person's exercise of religion, unless the government demonstrates that the application of the burden to the person is the least restrictive means of furthering a compelling governmental interest. *See* 42 U.S.C. § 2000bb-1. To establish a claim under RFRA, a plaintiff must prove "the following three elements: (1) a substantial burden imposed by the federal government on a (2) sincere (3) exercise of religion." *Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir. 2001); *see Hobby Lobby*, 723 F.3d at 1125-1126. The burden then shifts to the government, even at the preliminary injunction stage, to show that the compelling interest test is satisfied. *See Hobby Lobby*, 723 F.3d at 1126; *see also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). There is no question in this case that Plaintiffs' religious beliefs are sincere and that their opposition to ACA's contraceptive mandate is a religious exercise. Defendants also concede that, under the holding of *Hobby Lobby*, the federal government cannot satisfy the compelling interest test. *See* Defs.' Mem. Opp'n Pls.' Mot. Prelim. Inj. [Doc. No. 50], at 21. Thus, Plaintiffs' likelihood of success on the merits of their RFRA claim hinges on their ability to establish a substantial burden.

According to the Tenth Circuit, the substantial burden test has three prongs:

> [A] government act imposes a "substantial burden" on religious exercise if it: (1)

> "requires participation in an activity prohibited by a sincerely held religious belief," (2) "prevents participation in conduct motivated by a sincerely held religious belief," or (3) "places substantial pressure on an adherent . . . to engage in conduct contrary to a sincerely held religious belief."

Hobby Lobby, 723 F.3d at 1138 (quoting *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010)). The court of appeals found in *Hobby Lobby* that ACA's coverage mandate substantially burdens the religious exercise of persons who oppose covered contraceptive services on religious grounds under the third, "substantial pressure" prong. Although *Hobby Lobby* is factually distinguishable, the court of appeals' decision teaches the proper framework for a "substantial pressure" analysis.

"First, we must identify the religious belief in this case." *Id.* at 1140. Like the corporate employers in *Hobby Lobby*, Plaintiffs have religious objections to contraceptive methods that they believe cause the death of a fertilized human embryo, and to providing access to or otherwise supporting contraceptive services related to these methods. Further, in this case, Plaintiffs assert that "as a matter of religious faith, Plaintiffs may not participate in any way in the government's program to provide access to these services." *See* Pls.' Mot. Prelim. Inj. [Doc. No. 7] at 11; *see also* Compl. [Doc. No. 1], 177-78. Defendants dispute whether the specific tasks to which Plaintiffs object, such as signing the self-certification form or providing it to a TPA, constitute "participation" in the program or facilitate access to contraceptive services, but Defendants acknowledge the strength of Plaintiffs'

opposition to ACA's contraceptive mandate and the faith-based nature of their opposition.

"Second, we must determine whether this belief is sincere." *Hobby Lobby*, 723 F.3d at 1140. Here, as in *Hobby Lobby*, Plaintiffs' sincerity is unquestioned.

"Third, we turn to the question of whether the government places substantial pressure on the religious believer." *Id.* Here, as in *Hobby Lobby*, Plaintiffs contend that the pressure on their religious beliefs is substantial because participation in the accommodation would violate their beliefs, but refusing to participate will expose them to substantial financial penalties or losses. In response, Defendants contend Plaintiffs' view that participating in the accommodation – by self-certifying their eligibility and providing the self-certification form to a TPA – is legally flawed and misguided because their participation would not actually facilitate access to contraceptive coverage for participants and beneficiaries of the GuideStone Plan. Because, according to Defendants, the accommodation does not apply to church plans and a TPA under the GuideStone Plan need not offer or provide contraceptive coverage, Plaintiffs' self-certification forms would not actually trigger the accommodation process or carry out ACA's contraceptive mandate, and, thus, Plaintiffs' opposition to signing the form is unfounded.

Upon consideration, the Court finds Defendants' argument to be simply another variation of a proposition rejected by the court of appeals in *Hobby Lobby*. In that case, the government argued that complying with the contraceptive mandate was not a substantial burden on the employers' beliefs because the burden arose from the independent acts

of third parties, such as employees or dependents who utilized the coverage. This argument was found to be "fundamentally flawed because it advances an understanding of 'substantial burden' that presumes 'substantial' requires an inquiry into the theological merit of the belief in question rather than the *intensity of the coercion* applied by the government to act contrary to those beliefs." *Id.* at 1137 (emphasis in original). The court determined that the question for decision was "not whether the reasonable observer would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity." *Id.*

In this case, Plaintiffs have measured their complicity in facilitating ACA's contraceptive mandate and determined that participating in the accommodation would endorse contraceptive services they deem morally problematic. As discussed *supra*, Plaintiffs' religious beliefs do not permit them to take the affirmative steps necessary to qualify their employees for certain contraceptive services under ACA's coverage scheme. Regardless whether the self-certification form actually results in the provision of such contraceptive coverage or services,[8] Plaintiffs believe that the acts of executing the form and providing it to a TPA convey support for the accommodation program and its goal of carrying out

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[8] Evidence was presented by Plaintiffs, without effective response by Defendants, that the largest GuideStone TPA, Highmark Inc. ("Highmark"), will provide the objected-to contraceptives upon receipt of the self-certification form. *See* Pls.' Combined Reply Br., Ex. 1, Ormont Decl. [Doc. No. 56-1]. Defendants' litigation position that there is no ERISA enforcement mechanism regarding self-insured church plans utterly fails to address the real potential for voluntary compliance by TPAs such as Highmark.

ACA's contraceptive mandate. The self-certification form states it certifies that the organization's health plan qualifies for the accommodation with respect to the mandate, and it provides notice to a TPA of obligations under the accommodation regulations. In addition, the model language of the written notice that a TPA must give to plan beneficiaries states that their employer has provided the certification, and so separate contraceptive coverage is available from a third party. *See* 26 C.F.R. § 54.9815-2713A(d). Further, as noted, at least one TPA for GuideStone, Highmark, has adopted a plan to carry out the accommodation. Regardless whether Highmark is compelled to comply or does so voluntarily, Plaintiffs' concern for apparent complicity in the accommodation is not unfounded. In short, this Court, like Judge Cogan, rejects Defendants' "it's just a form" argument. *See Roman Catholic Archdiocese of New York*, 2013 WL 6579764 at *14.

Under *Hobby Lobby*, the Court's "only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief." *Hobby Lobby*, 723 F.3d at 1137. Upon consideration of the record, the Court finds the accommodation scheme applies substantial pressure on Plaintiffs to violate their belief that participating in or facilitating the accommodation is the moral equivalent of directly complying with the contraceptive mandate. By refusing to participate, Reaching Souls, Truett-College, and similarly situated organizations face substantial financial penalties, and their refusal will cause a substantial financial loss to GuideStone if it excludes nonexempt, noncompliant organizations from the GuideStone Plan. Here, as in *Hobby Lobby*,

the Court finds that Plaintiffs have made a threshold showing of a substantial burden, and, thus, a likelihood of success on their RFRA claim.[9]

B. Remaining Requirements

The Tenth Circuit has held that "establishing a likely RFRA violation satisfies the irreparable harm factor." *Hobby Lobby*, 723 F.3d at 1146; *see Kikumura*, 242 F.3d at 963. The Court further finds that the harm to Plaintiffs without the injunction outweighs any harm to Defendants' interest in carrying out the accommodation. As noted in *Hobby Lobby*, the government has already granted an exemption from the contraceptive mandate to many religious organizations, and only a small number of contraceptive services covered by the mandate are at issue. In addition, the government has taken the position in this case that the accommodation is not enforceable against the GuideStone Plan anyway. On the other hand, Plaintiffs face the real dilemma of violating their religious beliefs or incurring financial penalties. Finally, in light of the current legal uncertainty regarding the enforceability of the contraceptive mandate in light of *Hobby Lobby* and other federal appellate decisions, the Court finds that the public interest lies in preserving the status quo and preventing enforcement of the accommodation until Plaintiffs' claims are resolved.

CONCLUSION

In summary, the Court concludes that Plaintiffs have satisfied their burden to establish standing to

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[9] In light of this conclusion, the Court need not reach the First Amendment claims on which Plaintiffs also rely in their Motion.

challenge the accommodation and that a preliminary injunction should issue to prevent the federal government from enforcing the accommodation and contraceptive mandate against them.[10]

ORDER

IT IS THEREFORE ORDERED that Plaintiffs' Motion for Preliminary Injunction [Doc. No. 7] is GRANTED, and that Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction [Doc. No. 51] is DENIED. The following preliminary injunction is issued:

PRELIMINARY INJUNCTION

Defendants, their agents, officers, and employees are hereby enjoined and restrained from taking any enforcement action against Plaintiffs, or any employers who provide medical coverage to employees under the GuideStone Plan and who are "eligible organizations" as defined by 26 C.F.R. § 54.9815-2713A(a), 29 C.F.R. § 2590.715-2713A(a), and 45 C.F.R. § 147.131(b), for not providing coverage for contraceptive services as required by 42 U.S.C. § 300gg-13(a)(4) and related regulations, including any penalties, fines and assessments for noncompliance

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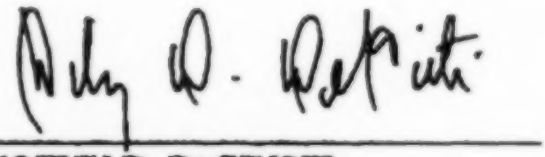
[10] Plaintiffs have offered to provide security, as required by Fed. R. Civ. P. 65(c), by posting a bond in an amount to be determined by the Court. Defendants have not requested security, and this issue was not addressed in further briefing or argument. In this circuit, "trial courts have 'wide discretion under Rule 65(c) in determining whether to require security.'" *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1215 (10th Cir. 2009) (quoting *Winnebago Tribe of Nebraska v. Stovall*, 341 F.3d 1202, 1206 (10th Cir. 2003)). Under the circumstances presented, the Court finds that Defendants are unlikely to suffer monetary harm if it is later determined they were wrongfully enjoined, and thus, no security is necessary.

with that statute, until further order of the Court.

IT IS SO ORDERED this 20th day of December, 2013.



TIMOTHY D. DEGIUSTI
UNITED STATES DISTRICT JUDGE

APPENDIX E

U.S. Constitution Amendment I provides:

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

42 U.S.C. § 2000bb-1 provides:

§ 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that

violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C. § 300gg-13(a)(4) provides:

§ 300gg-13. Coverage of preventive health services

(a) In general

A group health plan and a health insurances issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for—

* * *

(4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.

26 U.S.C. § 4980D provides:

§ 4980D. Failure to meet certain group health plan requirements

(a) General rule.—There is hereby imposed a tax on any failure of a group health plan to meet the requirements of chapter 100 (relating to group health plan requirements).

(b) Amount of tax.—

(1) In general.—The amount of the tax imposed by subsection (a) on any failure shall be $100 for each day in the noncompliance period with respect to each

individual to whom such failure relates.

(2) Noncompliance period.—For purposes of this section, the term "noncompliance period" means, with respect to any failure, the period—

(A) beginning on the date such failure first occurs, and

(B) ending on the date such failure is corrected.

(3) Minimum tax for noncompliance period where failure discovered after notice of examination.—Notwithstanding paragraphs (1) and (2) of subsection (c)—

(A) In general.—In the case of 1 or more failures with respect to an individual—

(i) which are not corrected before the date a notice of examination of income tax liability is sent to the employer, and

(ii) which occurred or continued during the period under examination, the amount of tax imposed by subsection (a) by reason of such failures with respect to such individual shall not be less than the lesser of $2,500 or the amount of tax which would be imposed by subsection (a) without regard to such paragraphs.

(B) Higher minimum tax where violations are more than de minimis.—To the extent violations for which any person is liable under subsection (e) for any year are more than de minimis, subparagraph (A) shall be applied by substituting "$15,000" for "$2,500" with respect to such person.

(C) Exception for church plans.—This paragraph shall not apply to any failure under a church plan (as defined in section 414(e)).

(c) Limitations on amount of tax.—

(1) Tax not to apply where failure not discovered exercising reasonable diligence.—No tax shall be imposed by subsection (a) on any failure during any period for which it is established to the satisfaction of the Secretary that the person otherwise liable for such tax did not know, and exercising reasonable diligence would not have known, that such failure existed.

(2) Tax not to apply to failures corrected within certain periods.—No tax shall be imposed by subsection (a) on any failure if—

(A) such failure was due to reasonable cause and not to willful neglect, and

(B)(i) in the case of a plan other than a church plan (as defined in section 414(e)), such failure is corrected during the 30-day period beginning on the first date the person otherwise liable for such tax knew, or exercising reasonable diligence would have known, that such failure existed, and

(ii) in the case of a church plan (as so defined), such failure is corrected before the close of the correction period (determined under the rules of section 414(e)(4)(C)).

(3) Overall limitation for unintentional failures.—In the case of failures which are due to reasonable cause and not to willful neglect—

(A) Single employer plans.—

(i) In general.—In the case of failures with respect to plans other than specified multiple employer health plans, the tax imposed by subsection (a) for failures during the taxable year of the employer shall not exceed the amount equal to the lesser of—

(I) 10 percent of the aggregate amount paid or incurred by the employer (or predecessor employer)

during the preceding taxable year for group health plans, or

(II) $500,000.

(ii) Taxable years in the case of certain controlled groups.—For purposes of this subparagraph, if not all persons who are treated as a single employer for purposes of this section have the same taxable year, the taxable years taken into account shall be determined under principles similar to the principles of section 1561.

(B) Specified multiple employer health plans.—

(i) In general.—In the case of failures with respect to a specified multiple employer health plan, the tax imposed by subsection (a) for failures during the taxable year of the trust forming part of such plan shall not exceed the amount equal to the lesser of—

(I) 10 percent of the amount paid or incurred by such trust during such taxable year to provide medical care (as defined in section 9832(d)(3)) directly or through insurance, reimbursement, or otherwise, or

(II) $500,000.

For purposes of the preceding sentence, all plans of which the same trust forms a part shall be treated as one plan.

(ii) Special rule for employers required to pay tax.—If an employer is assessed a tax imposed by subsection (a) by reason of a failure with respect to a specified multiple employer health plan, the limit shall be determined under subparagraph (A) (and not under this subparagraph) and as if such plan were not a specified multiple employer health plan.

(4) Waiver by Secretary.—In the case of a failure

which is due to reasonable cause and not to willful neglect, the Secretary may waive part or all of the tax imposed by subsection (a) to the extent that the payment of such tax would be excessive relative to the failure involved.

(d) Tax not to apply to certain insured small employer plans.—

(1) In general.— In the case of a group health plan of a small employer which provides health insurance coverage solely through a contract with a health insurance issuer, no tax shall be imposed by this section on the employer on any failure (other than a failure attributable to section 9811) which is solely because of the health insurance coverage offered by such issuer.

(2) Small employer.—

(A) In general.—For purposes of paragraph (1), the term "small employer" means, with respect to a calendar year and a plan year, an employer who employed an average of at least 2 but not more than 50 employees on business days during the preceding calendar year and who employs at least 2 employees on the first day of the plan year. For purposes of the preceding sentence, all persons treated as a single employer under subsection (b), (c), (m), or (o) of section 414 shall be treated as one employer.

(B) Employers not in existence in preceding year.— In the case of an employer which was not in existence throughout the preceding calendar year, the determination of whether such employer is a small employer shall be based on the average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year.

(C) Predecessors.—Any reference in this paragraph to an employer shall include a reference to any predecessor of such employer.

(3) Health insurance coverage; health insurance issuer.—For purposes of paragraph (1), the terms "health insurance coverage" and "health insurance issuer" have the respective meanings given such terms by section 9832.

(e) Liability for tax.—The following shall be liable for the tax imposed by subsection (a) on a failure:

(1) Except as otherwise provided in this subsection, the employer.

(2) In the case of a multiemployer plan, the plan.

(3) In the case of a failure under section 9803 (relating to guaranteed renewability) with respect to a plan described in subsection (f)(2)(B), the plan.

(f) Definitions.—For purposes of this section—

(1) Group health plan.—The term "group health plan" has the meaning given such term by section 9832(a).

(2) Specified multiple employer health plan.—The term "specified multiple employer health plan" means a group health plan which is—

(A) any multiemployer plan, or

(B) any multiple employer welfare arrangement (as defined in section 3(40) of the Employee Retirement Income Security Act of 1974, as in effect on the date of the enactment of this section).

(3) Correction.—A failure of a group health plan shall be treated as corrected if—

(A) such failure is retroactively undone to the extent possible, and

(B) the person to whom the failure relates is placed in a financial position which is as good as such person would have been in had such failure not occurred.

26 U.S.C. § 4980H provides:

§ 4980H. Shared responsibility for employers regarding health coverage.

(a) Large employers not offering health coverage.—If—

(1) any applicable large employer fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

(2) at least one full-time employee of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee, then there is hereby imposed on the employer an assessable payment equal to the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

(b) Large employers offering coverage with employees who qualify for premium tax credits or cost-sharing reductions.—

(1) In general. —If—

(A) an applicable large employer offers to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as

defined in section 5000A(f)(2)) for any month, and

(B) 1 or more full-time employees of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee, then there is hereby imposed on the employer an assessable payment equal to the product of the number of full-time employees of the applicable large employer described in subparagraph (B) for such month and an amount equal to 1/12 of $3,000.

(2) Overall limitation.—The aggregate amount of tax determined under paragraph (1) with respect to all employees of an applicable large employer for any month shall not exceed the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

[(3) Repealed. Pub.L. 112-10, Div. B, Title VIII, § 1858(b)(4), Apr. 15, 2011, 125 Stat. 169]

(c) Definitions and special rules.—For purposes of this section—

(1) Applicable payment amount.—The term "applicable payment amount" means, with respect to any month, 1/12 of $2,000.

(2) Applicable large employer.—

(A) In general.— The term "applicable large employer" means, with respect to a calendar year, an employer who employed an average of at least 50 full-time employees on business days during the

preceding calendar year.

(B) Exemption for certain employers.—

(i) In general.—An employer shall not be considered to employ more than 50 full-time employees if—

(I) the employer's workforce exceeds 50 full-time employees for 120 days or fewer during the calendar year, and

(II) the employees in excess of 50 employed during such 120-day period were seasonal workers.

(ii) Definition of seasonal workers.— The term "seasonal worker" means a worker who performs labor or services on a seasonal basis as defined by the Secretary of Labor, including workers covered by section 500.20(s)(1) of title 29, Code of Federal Regulations and retail workers employed exclusively during holiday seasons.

(C) Rules for determining employer size.—For purposes of this paragraph—

(i) Application of aggregation rule for employers.— All persons treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986 shall be treated as 1 employer.

(ii) Employers not in existence in preceding year.— In the case of an employer which was not in existence throughout the preceding calendar year, the determination of whether such employer is an applicable large employer shall be based on the average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year.

(iii) Predecessors.—Any reference in this

subsection to an employer shall include a reference to any predecessor of such employer.

(D) Application of employer size to assessable penalties—

(i) In general.—The number of individuals employed by an applicable large employer as full- time employees during any month shall be reduced by 30 solely for purposes of calculating—

(I) the assessable payment under subsection (a), or

(II) the overall limitation under subsection (b)(2).

(ii) Aggregation—In the case of persons treated as 1 employer under subparagraph (C)(i), only 1 reduction under subclause (I) or (II) shall be allowed with respect to such persons and such reduction shall be allocated among such persons ratably on the basis of the number of full-time employees employed by each such person.

(E) Full-time equivalents treated as full-time employees.—Solely for purposes of determining whether an employer is an applicable large employer under this paragraph, an employer shall, in addition to the number of full-time employees for any month otherwise determined, include for such month a number of full-time employees determined by dividing the aggregate number of hours of service of employees who are not full-time employees for the month by 120.

(3) Applicable premium tax credit and cost-sharing reduction.—The term "applicable premium tax credit and cost-sharing reduction" means—

(A) any premium tax credit allowed under section 36B,

(B) any cost-sharing reduction under section 1402

of the Patient Protection and Affordable Care Act, and

(C) any advance payment of such credit or reduction under section 1412 of such Act.

(4) Full-time employee—

(A) In general.—The term "full-time employee" means, with respect to any month, an employee who is employed on average at least 30 hours of service per week.

(B) Hours of service.—The Secretary, in consultation with the Secretary of Labor, shall prescribe such regulations, rules, and guidance as may be necessary to determine the hours of service of an employee, including rules for the application of this paragraph to employees who are not compensated on an hourly basis.

(5) Inflation adjustment.—

(b) In general.—In the case of any calendar year after 2014, each of the dollar amounts in subsection (b) and paragraph (1) shall be increased by an amount equal to the product of—

(i) such dollar amount, and

(ii) the premium adjustment percentage (as defined in section 1302(c)(4) of the Patient Protection and Affordable Care Act) for the calendar year.

(A) Rounding.—If the amount of any increase under subparagraph (A) is not a multiple of $10, such increase shall be rounded to the next lowest multiple of $10.

(6) Other definitions.—Any term used in this section which is also used in the Patient Protection and Affordable Care Act shall have the same meaning as when used in such Act.

(7) Tax nondeductible.—For denial of deduction for the tax imposed by this section, see section 275(a)(6).

(d) Administration and procedure.—

(1) In general.—Any assessable payment provided by this section shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.

(2) Time for payment.—The Secretary may provide for the payment of any assessable payment provided by this section on an annual, monthly, or other periodic basis as the Secretary may prescribe.

(3) Coordination with credits, etc.— The Secretary shall prescribe rules, regulations, or guidance for the repayment of any assessable payment (including interest) if such payment is based on the allowance or payment of an applicable premium tax credit or cost-sharing reduction with respect to an employee, such allowance or payment is subsequently disallowed, and the assessable payment would not have been required to be made but for such allowance or payment.

29 U.S.C. §1002(16)(A) provides:

§ 1002. Definitions.

(16)(A) The term "administrator" means--

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by

regulation prescribe.

(B) The term "plan sponsor" means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

26 C.F.R. § 54.9815–2713 provides:

§ 54.9815–2713 Coverage of preventive health services.

(1) Services—(1) In general. Beginning at the time described in paragraph (b) of this section and subject to § 54.9815–2713A, a group health plan, or a health insurance issuer offering group health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

(i) [Reserved]

(ii) [Reserved]

(iii) [Reserved]

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration, in

accordance with 45 CFR 147.131(a).

(1) Office visits. [Reserved]

(2) Out-of-network providers. [Reserved]

(3) Reasonable medical management. [Reserved]

(4) Services not described. [Reserved]

(b) Timing. [Reserved]

(c) Recommendations not current. [Reserved]

(d) Effective/applicability date. April 16, 2012.

26 C.F.R. § 54.9815–2713A provides:

§ 54.9815–2713A. Accommodations in connection with coverage of preventive health services.

(a) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretaries of Health and Human Services and Labor, that it satisfies the criteria in paragraphs (a)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (b) or (c) of this section applies. The self-

certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

(b) [Reserved]. For further guidance, see § 54.9815–2713AT(b).

(c) Contraceptive coverage—self-insured group health plans—(1) [Reserved]. For further guidance, see § 54.9815–2713AT(c)(1).

(2) Payments for contraceptive services. (i) [Reserved]. For further guidance, see § 54.9815–2713AT(c)(2)(i) introductory text.

(iii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act, as incorporated into section 9815. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide

payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services—self-insured and insured group health plans. For each plan year to which the accommodation in paragraph (b) or (c) of this section is to apply, a third party administrator required to provide or arrange payments for contraceptive services pursuant to paragraph (b) of this section, and an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section, must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your employer has certified that your group health plan qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your employer will not contract, arrange, pay, or refer for contraceptive coverage. Instead,

[name of third party administrator/health insurance issuer] will provide or arrange separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your group health plan. Your employer will not administer or fund these payments. If you have any questions about this notice, contact [contact information for third party administrator/health insurance issuer]."

(1) Reliance—insured group health plans. (1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

(f) [Reserved]. For further guidance, see § 54.9815-2713AT(f).

26 C.F.R. § 54.9815-2713AT provides:

§ 54.9815-2713AT Accommodations in connection with coverage of preventive health services (temporary).

(a) [Reserved]. For further guidance, see § 54.9815-2713A(a).

(b) Contraceptive coverage--self-insured group health plans. (1) A group health plan established or maintained by an eligible organization that provides benefits on a self-insured basis complies for one or more plan years with any requirement under § 54.9815-2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph (b)(1) are satisfied:

(i) The eligible organization or its plan contracts with one or more third party administrators.

(ii) The eligible organization provides either a copy of the self-certification to each third party administrator or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage of all or a subset of contraceptive services.

(A) When a copy of the self-certification is provided directly to a third party administrator, such self-certification must include notice that obligations of the third party administrator are set forth in 29 CFR 2510.3-16 and this section and under § 54.9815-2713A.

(B) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on sincerely held religious beliefs to coverage of some or all contraceptive services (including an identification of the subset of contraceptive services

to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Labor (working with the Department of Health and Human Services), will send a separate notification to each of the plan's third party administrators informing the third party administrator that the Secretary of Health and Human Services has received a notice under paragraph (b)(1)(ii) of this section and describing the obligations of the third party administrator under 29 CFR 2510.3-16 and this section and under § 54.9815-2713A.

(2) If a third party administrator receives a copy of the self-certification from an eligible organization or a notification from the Department of Labor, as described in paragraph (b)(1)(ii) of this section, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services using one of the following methods--

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or

indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

(3) If a third party administrator provides or arranges payments for contraceptive services in accordance with either paragraph (b)(2)(i) or (ii) of this section, the costs of providing or arranging such payments may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer pursuant to 45 CFR 156.50(d).

(4) A third party administrator may not require any documentation other than a copy of the self-certification from the eligible organization or notification from the Department of Labor described in paragraph (b)(1)(ii) of this section.

(c) Contraceptive coverage--insured group health plans-- (1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 54.9815-2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan provides either a copy of the self-certification to each issuer providing coverage in connection with the plan or a notice to the Secretary of Health and Human Services that it is an eligible organization

and of its religious objection to coverage for all or a subset of contraceptive services.

(i) When a copy of the self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage in accordance with § 54.9815-2713. An issuer may not require any further documentation from the eligible organization regarding its status as such.

(ii) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on its sincerely held religious beliefs to coverage of some or all contraceptive services, as applicable (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Health and Human Services will send a separate notification to each of the plan's health insurance issuers informing the issuer that the Secretary of Health and Human Services has received a notice under paragraph (c)(1) of this section and describing the obligations of the issuer under this section and under § 54.9815-2713A.

(2) Payments for contraceptive services.

(i) A group health insurance issuer that receives a copy of the self-certification or notification described in paragraph (b)(1)(ii) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 54.9815-2713(a)(1)(iv) must—

(ii) [Reserved]. For further guidance, see §54.9815–2713A(c)(2)(ii).

(d) [Reserved]. For further guidance, see §54.9815–2713A(d).

(e) [Reserved]. For further guidance, see §54.9815–2713A(e).

(f) Expiration date. This section expires on August 22, 2017 or on such earlier date as may be provided in final regulations or other action published in the Federal Register.

29 C.F.R. §§ 2510.3-16 provides:

§ 2510.3-16 Definition of "plan administrator."

(a) In general. The term "plan administrator" or "administrator" means the person specifically so designated by the terms of the instrument under which the plan is operated. If an administrator is not so designated, the plan administrator is the plan sponsor, as defined in section 3(16)(B) of ERISA.

(b) In the case of a self-insured group health plan established or maintained by an eligible organization, as defined in § 2590.715-2713A(a) of this chapter, if the eligible organization provides a copy of the self-certification of its objection to administering or funding any contraceptive benefits in accordance with § 2590.715-2713A(b)(1)(ii) of this chapter to a third

party administrator, the self-certification shall be an instrument under which the plan is operated, shall be treated as a designation of the third party administrator as the plan administrator under section 3(16) of ERISA for any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) of this chapter to which the eligible organization objects on religious grounds, and shall supersede any earlier designation. If, instead, the eligible organization notifies the Secretary of Health and Human Services of its objection to administering or funding any contraceptive benefits in accordance with § 2590.715-2713A(b)(1)(ii) of this chapter, the Department of Labor, working with the Department of Health and Human Services, shall separately provide notification to each third party administrator that such third party administrator shall be the plan administrator under section 3(16) of ERISA for any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) of this chapter to which the eligible organization objects on religious grounds, with respect to benefits for contraceptive services that the third party administrator would otherwise manage. Such notification from the Department of Labor shall be an instrument under which the plan is operated and shall supersede any earlier designation.

(c) A third party administrator that becomes a plan administrator pursuant to this section shall be responsible for--

(1) Complying with section 2713 of the Public Health Service Act (42 U.S.C. 300gg-13) (as incorporated into section 715 of ERISA) and § 2590.715-2713 of this chapter with respect to coverage of contraceptive services. To the extent the

plan contracts with different third party administrators for different classifications of benefits (such as prescription drug benefits versus inpatient and outpatient benefits), each third party administrator is responsible for providing contraceptive coverage that complies with section 2713 of the Public Health Service Act (as incorporated into section 715 of ERISA) and § 2590.715-2713 of this chapter with respect to the classification or classifications of benefits subject to its contract.

(2) Establishing and operating a procedure for determining such claims for contraceptive services in accordance with § 2560.503-1 of this chapter.

(3) Complying with disclosure and other requirements applicable to group health plans under Title I of ERISA with respect to such benefits.

29 C.F.R. § 2590.715–2713 provides:

§ 2590.715–2713 Coverage of preventive health services

(a) Services—

(1) In general. Beginning at the time described in paragraph (b) of this section and subject to § 2590.715–2713A, a group health plan, or a health insurance issuer offering group health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

(i) Evidence-based items or services that have in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual involved (except as otherwise provided in paragraph

(c) of this section);

(ii) Immunizations for routine use in children, adolescents, and adults that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved (for this purpose, a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention is considered in effect after it has been adopted by the Director of the Centers for Disease Control and Prevention, and a recommendation is considered to be for routine use if it is listed on the Immunization Schedules of the Centers for Disease Control and Prevention);

(iii) With respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in comprehensive guidelines supported by the Health Resources and Services Administration; and

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration, in accordance with 45 CFR 147.131(a).

(2) Office visits—

(i) If an item or service described in paragraph (a)(1) of this section is billed separately (or is tracked as individual encounter data separately) from an office visit, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(ii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is the delivery of such an item or service, then a plan or issuer may not impose cost-sharing requirements with respect to the office visit.

(iii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is not the delivery of such an item or service, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(iv) The rules of this paragraph (a)(2) are illustrated by the following examples:

Example 1.

(i) Facts. An individual covered by a group health plan visits an in-network health care provider. While visiting the provider, the individual is screened for cholesterol abnormalities, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit and for the laboratory work of the cholesterol screening test.

(ii) Conclusion. In this Example 1, the plan may not impose any cost-sharing requirements with respect to the separately-billed laboratory work of the cholesterol screening test. Because the office visit is billed separately from the cholesterol screening test, the plan may impose cost-sharing requirements for the office visit.

Example 2.

(i) Facts. Same facts as Example 1. As the result of the screening, the individual is diagnosed with hyperlipidemia and is prescribed a course of treatment that is not included in the recommendations under paragraph (a)(1) of this section.

(ii) Conclusion. In this Example 2, because the treatment is not included in the recommendations under paragraph (a)(1) of this section, the plan is not prohibited from imposing cost-sharing requirements with respect to the treatment.

Example 3.

(i) Facts. An individual covered by a group health plan visits an in-network health care provider to discuss recurring abdominal pain. During the visit, the individual has a blood pressure screening, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit.

(ii) Conclusion. In this Example 3, the blood pressure screening is provided as part of an office visit for which the primary purpose was not to deliver items or services described in paragraph (a)(1) of this section. Therefore, the plan may impose a cost-sharing requirement for the office visit charge.

Example 4.

(i) Facts. A child covered by a group health plan visits an in-network pediatrician to receive an annual physical exam described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. During the office visit, the

child receives additional items and services that are not described in the comprehensive guidelines supported by the Health Resources and Services Administration, nor otherwise described in paragraph (a)(1) of this section. The provider bills the plan for an office visit.

(ii) Conclusion. In this Example 4, the service was not billed as a separate charge and was billed as part of an office visit. Moreover, the primary purpose for the visit was to deliver items and services described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. Therefore, the plan may not impose a cost-sharing requirement with respect to the office visit.

(3) Out-of-network providers. Nothing in this section requires a plan or issuer that has a network of providers to provide benefits for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider. Moreover, nothing in this section precludes a plan or issuer that has a network of providers from imposing cost-sharing requirements for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider.

(4) Reasonable medical management. Nothing prevents a plan or issuer from using reasonable medical management techniques to determine the frequency, method, treatment, or setting for an item or service described in paragraph (a)(1) of this section to the extent not specified in the recommendation or guideline.

(5) Services not described. Nothing in this section prohibits a plan or issuer from providing coverage for items and services in addition to those recommended

by the United States Preventive Services Task Force or the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention, or provided for by guidelines supported by the Health Resources and Services Administration, or from denying coverage for items and services that are not recommended by that task force or that advisory committee, or under those guidelines. A plan or issuer may impose cost-sharing requirements for a treatment not described in paragraph (a)(1) of this section, even if the treatment results from an item or service described in paragraph (a)(1) of this section.

(b) Timing—

(1) In general. A plan or issuer must provide coverage pursuant to paragraph (a)(1) of this section for plan years that begin on or after September 23, 2010, or, if later, for plan years that begin on or after the date that is one year after the date the recommendation or guideline is issued.

(2) Changes in recommendations or guidelines. A plan or issuer is not required under this section to provide coverage for any items and services specified in any recommendation or guideline described in paragraph (a)(1) of this section after the recommendation or guideline is no longer described in paragraph (a)(1) of this section. Other requirements of Federal or State law may apply in connection with a plan or issuer ceasing to provide coverage for any such items or services, including PHS Act section 2715(d)(4), which requires a plan or issuer to give 60 days advance notice to an enrollee before any material modification will become effective.

(c) Recommendations not current. For purposes of

paragraph (a)(1)(i) of this section, and for purposes of any other provision of law, recommendations of the United States Preventive Services Task Force regarding breast cancer screening, mammography, and prevention issued in or around November 2009 are not considered to be current.

(d) Applicability date. The provisions of this section apply for plan years beginning on or after September 23, 2010. See § 2590.715–1251 of this Part for determining the application of this section to grandfathered health plans (providing that these rules regarding coverage of preventive health services do not apply to grandfathered health plans).

29 C.F.R. § 2590.715-2713A provides:

§ 2590.715-2713A. Accommodations in connection with coverage of preventive health services

(a) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (a)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the

first plan year to which the accommodation in paragraph (b) or (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

(b) Contraceptive coverage--self-insured group health plans—

(1) A group health plan established or maintained by an eligible organization that provides benefits on a self-insured basis complies for one or more plan years with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph (b)(1) are satisfied:

(i) The eligible organization or its plan contracts with one or more third party administrators.

(ii) The eligible organization provides either a copy of the self-certification to each third party administrator or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage of all or a subset of contraceptive services.

(A) When a copy of the self-certification is provided directly to a third party administrator, such self-certification must include notice that obligations of the third party administrator are set forth in § 2510.3-16 of this chapter and this section.

(B) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on sincerely held religious beliefs to coverage of

some or all contraceptive services (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Labor (working with the Department of Health and Human Services), shall send a separate notification to each of the plan's third party administrators informing the third party administrator that the Secretary of Health and Human Services has received a notice under paragraph (b)(1)(ii) of this section and describing the obligations of the third party administrator under § 2510.3-16 of this chapter and this section.

(2) If a third party administrator receives a copy of the self-certification from an eligible organization or a notification from the Department of Labor, as described in paragraph (b)(1)(ii) of this section, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services using one of the following methods--

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment,

coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

(3) If a third party administrator provides or arranges payments for contraceptive services in accordance with either paragraph (b)(2)(i) or (ii) of this section, the costs of providing or arranging such payments may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer pursuant to 45 CFR 156.50(d).

(4) A third party administrator may not require any documentation other than a copy of the self-certification from the eligible organization or notification from the Department of Labor described in paragraph (b)(1)(ii) of this section.

(c) Contraceptive coverage--insured group health plans –

(1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan provides either a copy of the self-certification to each issuer providing

coverage in connection with the plan or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage for all or a subset of contraceptive services.

(i) When a copy of the self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage in accordance with § 2590.715-2713. An issuer may not require any further documentation from the eligible organization regarding its status as such.

(ii) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on its sincerely held religious beliefs to coverage of some or all contraceptive services, as applicable (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Health and Human Services will send a separate notification to each of the plan's health insurance issuers informing the issuer that the Secretary of Health and Human Services has received a notice under paragraph (c)(1) of this section and describing the obligations of the issuer

under this section.

(2) Payments for contraceptive services --(i) A group health insurance issuer that receives a copy of the self-certification or notification described in paragraph (c)(1)(ii) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 2590.715-2713(a)(1)(iv) must--

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act, as incorporated into section 715 of ERISA. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered

under § 2590.715-2713(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services--self-insured and insured group health plans. For each plan year to which the accommodation in paragraph (b) or (c) of this section is to apply, a third party administrator required to provide or arrange payments for contraceptive services pursuant to paragraph (b) of this section, and an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section, must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your employer has certified that your group health plan qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved

contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your employer will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of third party administrator/health insurance issuer] will provide or arrange separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your group health plan. Your employer will not administer or fund these payments. If you have any questions about this notice, contact [contact information for third party administrator/health insurance issuer]."

(e) Reliance--insured group health plans –

(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

45 C.F.R. § 147.130 provides:

§ 147.130 Coverage of preventive health services.

(a) Services—

(1) In general. Beginning at the time described in paragraph (b) of this section and subject to § 147.131, a group health plan, or a health insurance issuer offering group or individual health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

(i) Evidence-based items or services that have in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual involved (except as otherwise provided in paragraph (c) of this section);

(ii) Immunizations for routine use in children, adolescents, and adults that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved (for this purpose, a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention is considered in effect after it has been adopted by the Director of the Centers for Disease Control and Prevention, and a recommendation is considered to be for routine use if it is listed on the Immunization Schedules of the Centers for Disease Control and Prevention);

(iii) With respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in comprehensive guidelines supported by the Health Resources and Services Administration; and

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration.

(2) Office visits—

(i) If an item or service described in paragraph (a)(1) of this section is billed separately (or is tracked as individual encounter data separately) from an office visit, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(ii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is the delivery of such an item or service, then a plan or issuer may not impose cost-sharing requirements with respect to the office visit.

(iii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is not the delivery of such an item or service, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(iv) The rules of this paragraph (a)(2) are illustrated by the following examples:

Example 1. (i) Facts. An individual covered by a group health plan visits an in-network health care provider. While visiting the provider, the individual is screened for cholesterol abnormalities, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit and for the laboratory work of the cholesterol screening test.

(ii) Conclusion. In this Example 1, the plan may not impose any cost-sharing requirements with respect to the separately-billed laboratory work of the cholesterol screening test. Because the office visit is billed separately from the cholesterol screening test, the plan may impose cost-sharing requirements for the office visit.

Example 2.

(i) Facts. Same facts as Example 1. As the result of the screening, the individual is diagnosed with hyperlipidemia and is prescribed a course of treatment that is not included in the recommendations under paragraph (a)(1) of this section.

(ii) Conclusion. In this Example 2, because the treatment is not included in the recommendations under paragraph (a)(1) of this section, the plan is not prohibited from imposing cost-sharing requirements with respect to the treatment.

Example 3.

(i) Facts. An individual covered by a group health plan visits an in-network health care provider to discuss recurring abdominal pain. During the visit, the individual has a blood pressure screening, which

has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit.

(ii) Conclusion. In this Example 3, the blood pressure screening is provided as part of an office visit for which the primary purpose was not to deliver items or services described in paragraph (a)(1) of this section. Therefore, the plan may impose a cost-sharing requirement for the office visit charge.

Example 4.

(i) Facts. A child covered by a group health plan visits an in-network pediatrician to receive an annual physical exam described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. During the office visit, the child receives additional items and services that are not described in the comprehensive guidelines supported by the Health Resources and Services Administration, nor otherwise described in paragraph (a)(1) of this section. The provider bills the plan for an office visit.

(ii) Conclusion. In this Example 4, the service was not billed as a separate charge and was billed as part of an office visit. Moreover, the primary purpose for the visit was to deliver items and services described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. Therefore, the plan may not impose a cost-sharing requirement for the office visit charge.

(3) Out-of-network providers. Nothing in this section requires a plan or issuer that has a network of providers to provide benefits for items or services described in paragraph (a)(1) of this section that are

delivered by an out-of-network provider. Moreover, nothing in this section precludes a plan or issuer that has a network of providers from imposing cost-sharing requirements for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider.

(4) Reasonable medical management. Nothing prevents a plan or issuer from using reasonable medical management techniques to determine the frequency, method, treatment, or setting for an item or service described in paragraph (a)(1) of this section to the extent not specified in the recommendation or guideline.

(5) Services not described. Nothing in this section prohibits a plan or issuer from providing coverage for items and services in addition to those recommended by the United States Preventive Services Task Force or the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention, or provided for by guidelines supported by the Health Resources and Services Administration, or from denying coverage for items and services that are not recommended by that task force or that advisory committee, or under those guidelines. A plan or issuer may impose cost-sharing requirements for a treatment not described in paragraph (a)(1) of this section, even if the treatment results from an item or service described in paragraph (a)(1) of this section.

(b) Timing—

(1) In general. A plan or issuer must provide coverage pursuant to paragraph (a)(1) of this section for plan years (in the individual market, policy years) that begin on or after September 23, 2010, or, if later,

for plan years (in the individual market, policy years) that begin on or after the date that is one year after the date the recommendation or guideline is issued.

(2) Changes in recommendations or guidelines. A plan or issuer is not required under this section to provide coverage for any items and services specified in any recommendation or guideline described in paragraph (a)(1) of this section after the recommendation or guideline is no longer described in paragraph (a)(1) of this section. Other requirements of Federal or State law may apply in connection with a plan or issuer ceasing to provide coverage for any such items or services, including PHS Act section 2715(d)(4), which requires a plan or issuer to give 60 days advance notice to an enrollee before any material modification will become effective.

(c) Recommendations not current. For purposes of paragraph (a)(1)(i) of this section, and for purposes of any other provision of law, recommendations of the United States Preventive Services Task Force regarding breast cancer screening, mammography, and prevention issued in or around November 2009 are not considered to be current.

(d) Applicability date. The provisions of this section apply for plan years (in the individual market, for policy years) beginning on or after September 23, 2010. See § 147.140 of this Part for determining the application of this section to grandfathered health plans (providing that these rules regarding coverage of preventive health services do not apply to grandfathered health plans).

45 C.F.R. § 147.131 provides:

§ 147.131 Exemption and accommodations in connection with coverage of preventive health services.

(a) Religious employers. In issuing guidelines under § 147.130(a)(1)(iv), the Health Resources and Services Administration may establish an exemption from such guidelines with respect to a group health plan established or maintained by a religious employer (and health insurance coverage provided in connection with a group health plan established or maintained by a religious employer) with respect to any requirement to cover contraceptive services under such guidelines. For purposes of this paragraph (a), a "religious employer" is an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

(b) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this

section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974.

(c) Contraceptive coverage—insured group health plans—

(1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan provides either a copy of the self-certification to each issuer providing coverage in connection with the plan or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage for all or a subset of contraceptive services.

(i) When a self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage in accordance with § 147.130. An issuer may not require any further documentation from the eligible organization regarding its status as such.

(ii) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on

which it qualifies for an accommodation; its objection based on its sincerely held religious beliefs to coverage of some or all contraceptive services, as applicable (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of § 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Health and Human Services will send a separate notification to each of the plan's health insurance issuers informing the issuer that the Secretary of Health and Human Services has received a notice under paragraph (c)(1) of this section and describing the obligations of the issuer under this section.

(2) Payments for contraceptive services—

(i) A group health insurance issuer that receives a copy of the self-certification or notification described in paragraph (c)(1)(ii) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 147.130(a)(1)(iv) must-

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any

contraceptive services required to be covered under § 147.130(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 147.130(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services--insured group health plans and student health insurance coverage. For each plan year to which the accommodation in paragraph (c) of this section is to apply, an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive

services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the issuer provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your [employer/institution of higher education] has certified that your [group health plan/student health insurance coverage] qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your [employer/institution of higher education] will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of health insurance issuer] will provide separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your [group health plan/student health insurance coverage]. Your [employer/institution of higher education] will not administer or fund these payments. If you have any questions about this notice, contact [contact information for health insurance issuer]."

(e) Reliance –

(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to

its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

(f) Application to student health insurance coverage. The provisions of this section apply to student health insurance coverage arranged by an eligible organization that is an institution of higher education in a manner comparable to that in which they apply to group health insurance coverage provided in connection with a group health plan established or maintained by an eligible organization that is an employer. In applying this section in the case of student health insurance coverage, a reference to "plan participants and beneficiaries" is a reference to student enrollees and their covered dependents.

APPENDIX F

EBSA FORM 700– CERTIFICATION

(revised August 2014)

This form may be used to certify that the health coverage established or maintained or arranged by the organization listed below qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing, pursuant to 26 CFR 54.9815-2713A, 29 CFR 2590.715-2713A, and 45 CFR 147.131. Alternatively, an eligible organization may also provide notice to the Secretary of Health and Human Services.

Please fill out this form completely. This form should be made available for examination upon request and maintained on file for at least 6 years following the end of the last applicable plan year.

Name of the objecting organization	
Name and title of the individual who is authorized to make,	

and makes, this certification on behalf of the organization	
Mailing and email addresses and phone number for the individual listed above	

I certify the organization is an eligible organization (as described in 26 CFR 54.9815-2713A(a), 29 CFR 2590.715-2713A(a); 45 CFR 147.131(b)) that has a religious objection to providing coverage for some or all of any contraceptive services that would otherwise be required to be covered.

Note: An organization that offers coverage through the same group health plan as a religious employer (as defined in 45 CFR 147.131(a)) and/or an eligible organization (as defined in 26 CFR 54.9815-2713A(a); 29 CFR 2590.715-2713A(a); 45 CFR 147.131(b)), and that is part of the same controlled group of corporations as, or under common control with, such employer and/or organization (within the meaning of section 52(a) or (b) of the Internal Revenue Code), is considered to meet the requirements of 26 CFR 54.9815-2713A(a)(3), 29 CFR 2590.715-2713A(a)(3), and 45 CFR 147.131(b)(3).

I declare that I have made this certification, and that, to the best of my knowledge and belief, it is true

and correct. I also declare that this certification is complete.

_____

Signature of the individual listed above

_____

Date

The organization or its plan using this form must provide a copy of this certification to the plan's health insurance issuer (for insured health plans) or a third party administrator (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement.

Notice to Third Party Administrators of Self-Insured Health Plans

In the case of a group health plan that provides benefits on a self-insured basis, the provision of this certification to a third party administrator for the plan that will process claims for contraceptive coverage required under 26 CFR 54.9815-2713(a)(1)(iv) or 29 CFR 2590.715-2713(a)(1)(iv) constitutes notice to the third party administrator that the eligible organization:

(1) Will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

(2) The obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29

CFR 2590.715-2713A.

As an alternative to using this form, an eligible organization may provide notice to the Secretary of Health and Human Services that the eligible organization has a religious objection to providing coverage for all or a subset of contraceptive services, pursuant to 26 CFR 54.9815-2713A(b)(1)(ii)(B) and (c)(1)(ii), 29 CFR 2590.715-2713A(b)(1)(ii)(B) and (c)(1)(ii), and 45 CFR 147.131(c)(1)(ii). A model notice is available at:

http://www.cms.gov/cciio/resources/Regulations-and-Guidance/index.html#Prevention.

This form or a notice to the Secretary is an instrument under which the plan is operated.

PRA Disclosure Statement

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 1210-0150. An organization that seeks to be recognized as an eligible organization that qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing may complete this self-certification form, or provide notice to the Secretary of Health and Human Services, in order to obtain or retain the benefit of the exemption from covering certain contraceptive services. The self-certification form or notice to the Secretary of Health and Human Services must be maintained in a manner consistent with the record retention requirements under section

107 of the Employee Retirement Income Security Act of 1974, which generally requires records to be retained for six years. The time required to complete this information collection is estimated to average 50 minutes per response, including the time to review instructions, gather the necessary data, and complete and review the information collection. If you have comments concerning the accuracy of the time estimate(s) or suggestions for improving this form, please write to: U.S. Department of Labor, Employee Benefits Security Administration, Office of Policy and Research, 200 Constitution Avenue, N.W., Room N-5718, Washington, DC 20210 or email ebsa.opr@dol.gov and reference the OMB Control Number 1210-0150.